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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO

No. 5949

1655 1649

United States Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

THOMAS W. NEALON, Trustee, and J. J. MACKAY, Creditor,

Appellants,

vs.

GEORGE W. SHUTE, Bankrupt,

Appellee.

VOLUME I.

(Pages 1 to 432, Inclusive.)

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5949

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

ALICE M. BIRDSALL, Fleming Building, Phoenix, Arizona,

THOMAS W. NEALON, Trustee, Luhrs Building, Phoenix, Arizona,

Attorneys for Appellants.

ORME LEWIS, Luhrs Building, Phoenix, Arizona,

JAMES R. MOORE, Security Building, Phoenix, Arizona,

Attorneys for Appellee. [2*]

DEBTOR'S PETITION.

N. B.—Any person except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt. Sec. 4.

N. B.—All petitions and the schedules filed therewith shall be printed or written plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference. General Orders, Rule V.

N. B.—Bankrupt shall file with petition a schedule of his creditors and property all in triplicate. Sec. 7 (8:) also see Rule 35.

N. B.—$30.00 deposit required. Section 40, 48 and 52.

To the Honorable FRED C. JACOBS, Judge of the District Court of the United States, for the District of Arizona.

The petition of George W. Shute, of Phoenix,

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*Page-number appearing at the foot of page of original certified Transcript of Record.

in the county of Maricopa, in the District of Arizona, Lawyer, respectfully represents:
(State occupation)

That he has resided for the greater portion of six months next immediately preceding the filing of this petition at Phoenix, Arizona, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

WHEREFORE, your petitioner prays that he may be adjudged by the Court to be a bankrupt within the purview of said acts.

GEORGE WALTER SHUTE,
(Christian Name in Full)
Petitioner.

ORME LEWIS,
Attorney for Petitioner.
303 Luhrs Building, Phoenix, Arizona.
(Address)

A. The petition for adjudication shall be signed in the full Christian and surname of the petitioner and the petition for discharge in the same manner; in other places the customary signature of the signer may be used. Rule 14.

All petitions, schedules and pleadings must be upon white paper, approximately 14 inches long by 8½ inches wide. All pleadings must be properly endorsed with the name of the court, the title of the cause, and, if the parties appear by attorney, his name and office address. If the attorney resides in the city, the street and number must be given. Rule 13.

United States of America,
District of Arizona,—ss.

I, George W. Shute, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

GEORGE W. SHUTE,
Petitioner.

Subscribed and sworn to before me this 17th day of April, 1928.

[Seal] R. E. CONGER,
(Official Character)
Notary Public.

My commission expires Jan. 15, 1931.

N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankruptcy Act of 1898, c. 4, 20.

Filed Apr. 17, 1928. [3]

In the District Court of the United States for the Phoenix Division, District of Arizona.

No. B.-486—PHX.—IN BANKRUPTCY.

In the Matter of GEORGE W. SHUTE, Bankrupt.

BANKRUPT'S PETITION FOR DISCHARGE AND ORDER OF NOTICE THEREON.

To the Honorable F. C. JACOBS, Judge of the District Court of the United States for the District of Arizona.

George W. Shute, of Phoenix, in the County of Maricopa, and State of Arizona, in said District, respectfully represents that on the 17th day of April last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he duly surrendered all his property and rights of

property, and he fully complied with all the requirements of said acts and of the orders of the Court touching his bankruptcy.

WHEREFORE, he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this 29th day of May, A. D. 1928.

GEORGE W. SHUTE,
Bankrupt.

ORDER OF NOTICE.

——— District of Arizona,—ss.

On this 31st day of May, A. D. 1928, on reading the foregoing Petition for Discharge of the above-named Bankrupt, it is—

ORDERED by the Court, that a hearing be had upon the same on the 20th day of July, A. D. 1928, before the said court, at Phoenix, in said district, at ten o'clock in the forenoon; and that notice thereof be published in "The Messenger," a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the Court, that the Clerk shall send, by mail, to all known creditors, copies of said petition and this order, addressed to them at their places of residence as stated.

WITNESS The Honorable F. C. JACOBS, Judge of the said court, and the seal thereof, at Phoenix, in said district, on the 31st day of May, A. D. 1928.

[Seal of the Court] C. R. McFALL,
Clerk.
By M. R. Malcolm,
Deputy Clerk.

PROOF OF MAILING NOTICES.

I hereby certify that I have on this 9th day of June, A. D. 1928, sent by mail copies of the above order as therein directed.

C. R. McFALL,
Clerk.
By Thos. O. Bishop,
Deputy Clerk.

Petition. Filed May 29, 1928.
Order of Notice. Filed May 31, 1928. [4]

[Title of Court and Cause.]

APPEARANCE IN OPPOSITION TO DISCHARGE (THOMAS W. NEALON).

To the Clerk of the United States District Court for the District of Arizona:

Thomas W. Nealon, the trustee of the above-named bankrupt, duly authorized at a meeting of the creditors to oppose the bankrupt's discharge, hereby appears in opposition to the said bankrupt's discharge, and asks that his time for filing speci-

fications in opposition thereto be extended to October 15, 1928.

THOMAS W. NEALON,
Trustee.

Filed Jul. 20, 1928. [5]

[Title of Court and Cause.]

APPEARANCE IN OPPOSITION TO DISCHARGE (J. J. MACKAY).

To the Clerk of the United States District Court for the District of Arizona:

J. J. Mackay, a creditor of the above-named bankrupt, hereby appears in opposition to the said bankrupt's discharge, and asks that his time for filing specifications in opposition thereto be extended to October 15, 1928.

J. J. MACKAY.
By ALICE M. BIRDSALL,
His Attorney.

Filed Jul. 20, 1928. [6]

[Title of Court and Cause.]

TRUSTEE'S SPECIFICATIONS OF OBJECTIONS TO DISCHARGE OF BANKRUPT.

I, Thomas W. Nealon, of the City of Phoenix, County of Maricopa, State of Arizona, in the Federal District of Arizona, being the duly elected,

qualified and acting trustee of the bankrupt estate of the above-named bankrupt, do hereby oppose the granting to him of a discharge from his debts, having been duly authorized and instructed so to do at a meeting of creditors of the above-named bankrupt called for that purpose, of which meeting of creditors due notice was given as provided by law, said meeting of creditors having been held on the 22d day of July, 1928.

For the grounds of said opposition he files the following specifications:

FIRST: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that he has knowingly and fraudulently concealed from his Trustee property belonging to his estate in bankruptcy as follows:

(a) One Hudson car, described as 1928 Hudson Sedan, Motor Number 495,-579, Serial Number 799,342, owned by said bankrupt at the time of filing his petition in bankruptcy and by him placed in the custody of A. E. England shortly prior to bankruptcy with the intention that he and the said England [7] should keep said car concealed from said Trustee; and further, by knowingly and fraudulently omitting to schedule said car as an asset of said estate, either in the first schedule of his assets and liabilities filed by him

herein, or in the amended schedule of his assets and liabilities filed by him herein, which said amended schedule was filed after an order made by the Court upon written motion of a creditor requiring him so to do. The value of said Hudson car was, to wit, the sum of $900.00.. $900.00

(b) One life insurance policy upon the life of the bankrupt as follows: Policy No. 3310053, said policy having been issued by the Mutual Life Insurance Company of New York, dated May 25th, 1924; said life insurance policy being one in which he had the right to change the beneficiary without the consent of the beneficiary named therein, and which life insurance policy had a cash surrender value, at the time of the filing of the debtor's petition in bankruptcy of Seven Hundred Forty-six and 85/100 ($746.85) Dollars; said concealment having been made by knowingly and fraudulently omitting the same from his schedule of assets and by inserting in the form used, at the place for the listing of insurance policies, the word "None"; and by further stating, under oath, during the bankruptcy examination in the first meeting of $ 746.85

creditors that the said policy did not have any [8] cash surrender

	$1,646.85
Forward	$1,646.85

value; and by failing and refusing to produce said policy until demand was made therefor by said trustee at the continued first meeting of creditors on May 29th, 1928.

(c) A savings account in the First National Bank of Arizona, at Phoenix, Arizona, being account No. 19061, in the name of Jessie M. Shute, wife of said bankrupt, but against which account said bankrupt retained the right to check, said savings account being made up from funds acquired by the bankrupt subsequent to the marriage of said bankrupt and said Jessie M. Shute, and containing, on the 4th day of January, 1928, the sum of Three Thousand Six Hundred Eighty-seven and 50/100 ($3,687.50) Dollars, and from which account there was withdrawn, on the 27th day of February, 1928, the sum of Twelve Hundred Thirty-five ($1235.00) Dollars, paid to the First National Bank of Arizona as payment of a promissory note of one Joseph E.

Noble, dated October 18th, 1927, payable to said bank, and which note was signed by said bankrupt, G. W. Shute, as security; and from which savings account there was withdrawn, three days before said bankrupt filed his voluntary petition in bankruptcy herein, on, to wit, April 14, 1928, the sum of Fifteen Hundred ($1500.00) Dollars, which amount was delivered to the son-in-law of said [9] bankrupt,

$1,646.85

Forward $1,646.85

namely, Leslie Creed, leaving the amount of the said savings account in said bank on the day of filing said petition in bankruptcy, the sum of Eleven Hundred Sixty-two and 30/100 ($1162.30) Dollars. That said concealment was effected by knowingly and wilfully omitting any mention of said savings account or deposit from his schedules filed in said bankruptcy proceedings, and said omission being made for the purpose of concealing the existence thereof from the trustee and thereby hiding from him the said sum of money which was the community property of the said

bankrupt and his wife, the said Jessie M. Shute, and part of said bankrupt estate; and by knowingly and fraudulently concealing from said trustee the existence of said promissory note of Joseph E. Noble, paid by said bankrupt as aforesaid, and by knowingly and fraudulently concealing from said trustee the transfer of said amount of Fifteen Hundred ($1500.00) Dollars, from said savings account to said Leslie Creed $3,687.50

(d) One certain contract entered into by and between one Wesley Goswick and the bankrupt, on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of Twenty Thousand ($20,000.00) Dollars out of the proceeds of the sale by the said Wesley Goswick of a [10] cinnabar mining

$5,334.35

Forward $5,334.35

property consisting of twenty unpatented mining claims located upon or near what is known as Slate Creek in the County of Gila, State of Arizona, the title to said property

being in the name of said Goswick, and the sale thereof being made to one L. E. Foster, for the sum of Two Hundred Thousand ($200,000.00) Dollars, payable as follows: $5,000 on the 8th day of December, 1926; $10,000 on or before six months from the 8th day of December, 1926; $20,000 on or before one year from the 8th day of December, 1926; $82,500 on or before 18 months from the 8th day of December, 1926, and $82,500 on or before two years from the 8th day of December, 1926, less certain sums to be paid monthly by the purchaser of said property and less certain royalties which were to be paid by the purchaser as they were received on the smelting returns of the ore taken from said mine; a copy of which said contract between said Goswick and said Foster being held in escrow in the Old Dominion Bank of Globe, Arizona; the said mining property having been owned jointly by the said Wesley Goswick and one William A. Packard, with the exception of such interest as the said bankrupt had therein which interest of the bankrupt under said contract amounted to the said sum of Twenty Thousand

($20,000.00) Dollars, and was payable in an amount [11] of ten

	$5,334.35
Forward	$5,334.35

per cent (10%) of the payments made by the purchaser at the time they were made by the purchaser, said contract having been recognized by the said Wesley Goswick and the said William A. Packard and the payment of Five Hundred ($500.00) Dollars having been made thereon, on or about the 8th day of December, 1926, to the said bankrupt by the said Wesley Goswick and William A. Packard, and One Thousand ($1,000.00) Dollars having been on or about the 8th day of June, 1927, paid thereon to the said bankrupt by the said Goswick and said Packard, and the further sum of Two Thousand ($2,000.00) Dollars, being paid to the said bankrupt in the month of December, 1927, by the said Wesley Goswick, for and on behalf of the said Wesley Goswick and William A. Packard and subsequent to the adjudication in bankruptcy in, to wit, the month of June, 1928, a further sum of Eight Thousand ($8,000.00) Dollars having been

paid to said bankrupt, on said contract, by the said Wesley Goswick for and on behalf of himself and said William A. Packard; the said Wesley Goswick having on, to wit, August 20, 1927, assumed the payment to the said bankrupt of all subsequent payments to him under said contract on behalf of himself and said [12] Packard, and there be-

	$5,334.35
Forward	$5,334.35

ing still due to the trustee in bankruptcy, as the successor in interest of the said bankrupt, a further sum which, with the payments made aforesaid to said bankrupt, would make a total sum of $20,000, said sum, by said original contract, having become due on December 8, 1928, but some extension of the time of the making of the payment of the sum due by the purchaser thereon having been made prior to that time without the consent of your trustee in bankruptcy, the existence of the said contract and of the payments made thereon and to be made thereon having been knowingly and fraudulently concealed from your trustee by the knowing and wilful omission

by the bankrupt from his schedules of said property as one of the assets of said estate, and said omission being made with the intent and design of keeping your trustee in ignorance of the existence thereof and of the payments made and to be made thereon; and the further concealment of said contract and of payments made thereunder and to be made thereunder, by the testimony under oath of said bankrupt at the first meeting of creditors at which said bankrupt testified that he had never received from said Goswick any sum, in connection with the sale of said cinnabar property, except the amount of Five Hundred ($500.00) Dollars, which [13]

	$5,334.35
Forward	$5,334.35

amount he testified was a gift to him made in the month of December, 1927, and said bankrupt further testified that no further or other amounts were payable to him by said Goswick, and that he, said bankrupt, had no interest in said option and sale of said mining property made by said Goswick to said L. E. Foster $16,500.00

(e) The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as follows: Lots One (1), Two (2), Three (3), Four (4) and South Half (S.½) of Lot Five (5), Block Forty-five (45), East Globe Townsite, and being of the value of, to wit, Five Thousand ($5,000.00) Dollars, which said property was, up to the time that the title thereof passed to your trustee by operation of law on the filing of the petition in bankruptcy, the property of said bankrupt and purchased with funds acquired by him subsequent to the marriage of said bankrupt to the said Jessie M. Shute, together with a purchase money mortgage given by himself and the said Jessie M. Shute, as a part of the consideration thereof, the said mortgage being a community liability of the said bankrupt; said concealment having been effected by the bankrupt [14] knowingly and

$21,834.35

Forward $21,834.35

fraudulently omitting any description thereof from his schedules in bankruptcy filed herein, the said

property being situated in the county of Gila, and the said bankruptcy proceedings being in Maricopa County, and thus withholding from the trustee any information as to its existence, and further by the said bankrupt having in, to wit, the month of April, 1928, fraudulently and with intent to conceal said property from the said trustee, disclaimed any interest therein in favor of his wife, Jessie M. Shute, and delivered possession thereof to her and having since said time withheld possession thereof from said trustee and prevented the collection of the rents thereof by the said trustee, which rents amounted to the sum of, to wit, Fifty ($50.00) Dollars per month; and further by causing the said Jessie M. Shute, subsequent to the adjudication of bankruptcy herein, to file a declaration of homestead on said premises in her own name and by employing for and on behalf of the said Jessie M. Shute an attorney at law, one Clifton Matthews, of Globe, Arizona, to obstruct the securing of the possession thereof and the rents therefrom, by the trustee; the said declaration of homestead having been

filed in the office of the County Recorder of said [15] Gila County,

		$21,834.35
	Forward	$21,834.35
Arizona, on the 18th day of June, 1928, at 4:45 o'clock P. M., in Book 1 of Homesteads, pages 121 and 122, at the request of the said bankrupt	$ 5,000.00	
(f) One Essex car, described as Essex Coach Serial Number 640003, of the value of, to wit, the sum of Six Hundred ($600.00) Dollars, the property of said bankrupt estate, having been concealed by the said bankrupt knowingly and fraudulently omitting the same from his schedules with the intention of concealment from the trustee the existence thereof, the said car being further concealed by the placing of a license and certificate of title thereof in the name of said Jessie M. Shute, upon the pretense that the same was a gift by the bankrupt to said Jessie M. Shute, said bankrupt having been totally insolvent and not having sufficient assets to pay his debts for more than ten (10) years prior to the alleged gift	$ 600.00	

(g) The sum of Nine Hundred Ninety-five ($995.00) Dollars, being the amount which said bankrupt paid during the month of December, 1927, to A. E. England by check on the First National Bank of Arizona, signed by said [16] G. W. Shute,

$27,434.35

Forward $27,434.35

bankrupt, as a payment on a car for one Virginia L. Wentworth, of Globe, Arizona, which payment said bankrupt testified, under oath, at the first meeting of creditors, on the 29th of May, 1928, was made by him for said Virginia L. Wentworth in December, 1927, out of moneys paid to him by said Virginia L. Wentworth, but which money so paid to him by said Virginia L. Wentworth in December, 1927, did not appear in any statement or data furnished said trustee by said bankrupt, and has never been accounted for by said bankrupt, but has been knowingly and fraudulently concealed by said bankrupt from said trustee..... $ 995.00

(h) The sum of Two Hundred Fifty ($250.00) Dollars, which said bankrupt knowingly and fraudulently and with intent to conceal same from

	the trustee omitted from his schedule of assets filed herein, which said sum of $250.00 was a deposit made by said bankrupt with one Arthur LaPrade during the month of December, 1927, for the purpose of investment, and which subsequent to the adjudication in bankruptcy was returned to said bankrupt by said Arthur LaPrade	$ 250.00
(i)	One phonograph of the value of approximately Two Hundred ($200.00) Dollars, which phonograph said bankrupt knowingly and fraudulently concealed from said trustee by [17] omitting same	
		$28,679.35
	Forward	$28,679.35
	from his schedule of assets filed herein and by testifying under oath at the first meeting of creditors that he had no musical instrument.....	200.00
	The total amount of the concealment of property from your trustee by the methods hereinabove described being of the value of, to wit, the sum of Twenty-eight Thousand Eight Hundred Seventy-nine and 35/100 ($28,879.35) Dollars	$28,879.35

SECOND: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the bankruptcy act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. You have a car at the present time, have you not?
>
> A. I bought a car when I came down here, a Hudson, from my brother-in-law, and I paid $100 a month on it until it was paid for; then I traded it in on another car from England, and then traded that in on another one, which is the car I have now; there is probably $1,000 due on it. [18]

That said answer of said bankrupt was false as to a material fact in this, that the entire purchase price of said last-named car had been paid, and that there was no amount whatever due to said England thereon, and that said car was at said time an asset of said bankrupt estate, which was being concealed from said trustee by said bankrupt and said A. E. England, and said answer was given for the pur-

pose of deceiving the trustee into believing that the bankrupt estate had no interest in said car by reason of the fact that $1,000 of the purchase price was due thereon at said time, when in truth and in fact no part of the purchase price was due thereon at said time.

THIRD: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. (Referring to Hudson car owned by said bankrupt at the time of filing his petition in bankruptcy:) You have made no payments except the work you have done for him?
>
> A. That is about the way it would figure out; I don't think I made any cash payments at all. [19]

That said answer as given by said bankrupt was false as to a material fact in that cash payments had been made on said Hudson car by said bankrupt, as said bankrupt well knew at the time he so

answered said question, and that said car was entirely paid for, and was at the time said answer was given an asset of said estate, and should have been delivered by said bankrupt to said trustee, and that said answer was knowingly and fraudulently given by said bankrupt for the purpose of deceiving the trustee into the belief that a vendor's lien existed against said car in excess of the value thereof, when in truth and in fact said car was entirely paid for.

FOURTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. You did not schedule it? (Referring to Hudson car owned by said bankrupt at the date petition in bankruptcy was filed.)
>
> A. I turned it back.

That said answer so given by said bankrupt was false as to a material fact, because in truth and in fact, said car had not been turned back, but was being held by said A. E. England, acting in collu-

sion with the bankrupt, for the use of said [20] bankrupt and for the purpose of concealing the same from the trustee of said bankrupt estate, and the said car was not scheduled for the purpose of further aiding said bankrupt and said England in the concealment of said car from the trustee.

FIFTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. Since that time (January, 1924), how much have you received from the firm's business? (Referring to the firm of Armstrong, Lewis & Kramer.)
>
> A. Well, I can only give an approximation, but I think it is pretty close. I think the first year I received about $5500; that was 1924; in 1925, I received between $5500 and $6000; I think in 1926 it was about $8,000; I think the last year I received somewhere in the neighborhood of $10,000; that is about right, I think.

That said answer as given by said bankrupt was false as to a material fact in this that said bankrupt stated that he received from the firm's business, being the firm of Armstrong, [21] Lewis & Kramer, in which said bankrupt was, and had been since the year 1924, a partner, in the neighborhood of Ten Thousand ($10,000.00) Dollars, in the year 1927, when in truth and in fact said bankrupt received from the business of said firm of Armstrong, Lewis & Kramer, during the year 1927, the amount of Fifteen Thousand Two Hundred Fifty ($15,-250.00) Dollars, and that the difference between said amount of $10,000, which said bankrupt testified he had received from said firm's business during the year 1927, and said amount of $15,250, which was the true amount received by said bankrupt from said firm's business during the year 1927, to wit, the sum of Five Thousand Two Hundred Fifty ($5,-250.00) Dollars, constituted an asset of said bankrupt estate which should have been applied to the indebtedness of said bankrupt, and which amount it was incumbent upon said bankrupt to account for in order to satisfactorily explain the deficiency of his assets to meet his liabilities, and the amount of his receipts, the dissipation of which it was incumbent on him to explain satisfactorily in said bankruptcy proceedings, and that said answer was knowingly and fraudulently given by said bankrupt for the purpose of deceiving said trustee as to the true amount received by him from the firm of Armstrong, Lewis & Kramer during the year 1927.

SIXTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn by the referee in bankruptcy to testify to the whole truth in said matter, he has knowingly [22] and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. How much have you drawn from the firm (being the firm of Armstrong, Lewis & Kramer) since the first of the year?
>
> A. I think about $500 a month. There has been no dividend in April.

That said answer of said bankrupt was false as to a material fact in this, that said bankrupt stated that he had drawn about $500 a month since the first of the year (being the year 1928) when in truth and in fact said bankrupt had received from said firm of Armstrong, Lewis & Kramer between the first day of January, 1928, and the date of filing said petition in bankruptcy on April 17, 1928, the amount of Two Thousand Four Hundred Fifty ($2,450.00) Dollars; that said bankrupt further stated that there had been no dividend in April (being April, 1928) when in truth and in fact said

bankrupt had received from said firm of Armstrong, Lewis & Kramer a dividend in the amount of Seven Hundred Seventy-five ($775.00) Dollars, on the 10th day of April, 1928, which said amount of $775.00 said bankrupt had in his possession seven (7) days before filing his petition in bankruptcy, and that it was incumbent upon said bankrupt to account for the expenditure of said sum of $775.00 in order to satisfactorily explain the deficiency of his assets to meet his liabilities, and the disappearance of all the bankrupt's funds in bank except the amount scheduled by him in his voluntary petition in bankruptcy filed April 17, 1928, to wit, the amount of $15.67. [23]

SEVENTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false statement in and in relation to his proceedings in bankruptcy, as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. In addition to that (referring to receipts from the firm of Armstrong, Lewis & Kramer)

then, there should be other amounts that you have received in order to make the books complete?

A. That depends on the way you look at it. You will remember that I told you about the little block of stock we sold after we came down here. There was also a little Mrs. Shute owned in the Iron Blossom, I think it was called; there was 100 shares of that. We sold that and I used the money. There may be two or three small instances like that, but except in very small items of that kind, the income was from the firm.

That said answer of said bankrupt was false as to a material fact in this, that said bankrupt received, in truth and in fact, during the period between January 1st, 1926, and the date of the filing of his petition in bankruptcy, to wit, the 17th day of April, 1928, other income outside of the income received from the firm, in large amounts, to wit, the amount of at least Four Thousand ($4,000.00) Dollars, during said period of time, and that in making said statement and [24] answering said question as he did, said bankrupt was concealing said amount of $4,000 which he had received in income independent of the income received from the firm of Armstrong, Lewis & Kramer, during the period from the first day of January, 1926, to the 17th day of April, 1928, the receipt of Three Thousand ($3,000.00) Dollars, of said sum of $4,000, being payments made by one Wesley Goswick to said bankrupt during the year 1927, on a contract existing

between said bankrupt and said Wesley Goswick, which contract passed to the trustee by operation of law upon the filing of the voluntary petition in bankruptcy filed herein by said bankrupt, but the existence of which contract was concealed from the trustee, and that said answer was knowingly and fraudulently made by said bankrupt for the purpose of deceiving said trustee into believing that he had not received any income outside of the income received from the firm of Armstrong, Lewis & Kramer, and that it was material that said bankrupt should truthfully report his entire income during said period and account for same in order to satisfactorily explain in said bankruptcy proceedings the deficiency of his assets to meet his liabilities.

EIGHTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false statement in and in relation to his proceedings in bankruptcy, as follows: [25]

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

Q. During all of this period (period said bankrupt had been with the firm of Armstrong, Lewis & Kramer) did you receive any large sums of money from any other source other than those you have testified to?

A. I think I have testified to all of them, either at this hearing or the other one.

That the answer of said bankrupt to said question was false as to a material fact in this, that said bankrupt in truth and in fact had not testified as to amounts received by him during the period between January 1st, 1926, and the date of the filing of his petition in bankruptcy, to wit, the 17th day of April, 1928, and that in truth and in fact, said bankrupt had received during said period other income outside of the income received from the firm, in large amounts, to wit, the amount of at least Four Thousand ($4,000.00) Dollars, during said period of time, and that said bankrupt had not testified at any time as to the receipt by him of said amount of $4,000.00 received by him during said period, and that in making said statement and answering said question as he did, the said bankrupt was concealing said amount of at least $4,000 which he had received in income independent of the income received from the firm of Armstrong, Lewis & Kramer during said period between the 1st day of January, 1926, and said 17th day of April, 1928, and that it was material that said bankrupt should truthfully report his entire income during said period and account for the same in order to explain, in the bank-

ruptcy proceedings, the deficiency of his assets to meet his indebtedness, and that said answer of said bankrupt was knowingly [26] and fraudulently made for the purpose of deceiving said trustee into believing that said bankrupt had not received any large amounts of money from any other source than the firm of Armstrong, Lewis & Kramer.

NINTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made and rendered a false statement in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following questions propounded to him under examination at the first meeting of creditors, as answered by him:

Q. You have no interest in any mining property? A. None at all.

Q. Any mining claims? A. No.

Q. Have you represented any companies over there in any way as counsel from whom you have received fees since being in Phoenix?

A. I cannot think of any. It would be on the books here if I have.

Q. You have received nothing that would not show on the books of Armstrong, Lewis & Kramer? A. I don't think so.

Q. From Globe companies or from interests you have there? A. I don't think so. [27]

That said answers of said bankrupt to said questions and each of said answers are false as to a material fact, in this, that said bankrupt had an interest in mining property at the time of filing his petition in bankruptcy, to wit, a contract with one Wesley Goswick, whereby said bankrupt was to receive from said Wesley Goswick the sum of Twenty Thousand ($20,000) Dollars, being ten per cent (10%) of the purchase price of Two Hundred Thousand ($200,000.00) Dollars, to be paid by one L. E. Foster to said Wesley Goswick under a contract and agreement of sale whereby said Wesley Goswick agreed to sell and said L. E. Foster agreed to buy twenty unpatented mining claims located upon or near what is known as Slate Creek, in Gila County, Arizona, said contract between said Goswick and said Foster being in escrow in the Old Dominion Bank at Globe, Arizona, and by the terms of which said Foster agreed to pay said Goswick the sum of Five Thousand ($5,000.00) Dollars on the 8th day of December, 1926; Ten Thousand ($10,000.00) Dollars, on or before the 8th day of June, 1927; Twenty Thousand ($20,000.00) Dollars on or before the 8th day of December, 1927; Eighty-two Thousand Five Hundred ($82,500.00) Dollars on or before the 8th day of June, 1928, and Eighty-two Thousand Five Hundred ($82,500.00) Dollars on or before the 8th day of December, 1928, less certain amounts paid monthly and certain royalties to be credited on said purchase price; and that at the time

said bankrupt so answered said questions as aforesaid he had received on account of said contract the amount of Thirty-five Hundred ($3500.00) Dollars, none of which appeared upon the books of the firm of Armstrong Lewis & Kramer; that said bankrupt knowingly and fraudulently concealed the receipt of said amount and of said payments under said contract from the trustee in bankruptcy, and that it was material that said [28] bankrupt should reveal said amount of $3,500 and account for the same in order to satisfactorily explain the deficiency of his assets to meet his liabilities; and for the further reason that said bankrupt had further payments coming from said contract and said interest in said mining property, which were the property of the trustee of said bankrupt estate, and that by concealing the existence of said contract from said trustee in bankruptcy, said bankrupt was withholding assets from said estate which should properly be applied to the payment of the claims of said estate.

TENTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made and rendered a false statement in and in relation to his proceedings in bankruptcy, as follows:

That he knowingly and fraudulently made a false oath in answering the following questions propounded to him under examination at the first meeting of creditors, as answered by him:

Q. When was this $500 payment received from Mr. Goswick?

A. In December, 1927.

Q. Have you ever received any other amounts from him?

A. Only for fees; they would go into the firm.

Q. This $500 was not fees? A. No.

Q. Have you any interest in these options of Goswick's? A. No. [29]

Q. You do not expect to receive any other amounts from him other than this $500?

A. No.

Q. If he should send you any more money you would be surprised, would you?

A. I most certainly would.

That said answers of said bankrupt to said questions were, and each of said answers was, false as to a material fact in this, that said bankrupt received from said Goswick during the month of December, 1927, a payment of Two Thousand ($2,000.00) Dollars, and that the said bankrupt had received from said Goswick, at the time he so testified, other amounts, besides the sum of $2,000 of, to wit, Fifteen Hundred ($1500.00) Dollars, in addition to said amount of $500.00, the receipt of which was testified to by said bankrupt, and that at the time said bankrupt so testified he, in truth and in

fact, had an interest in the options of the said Wesley Goswick herein referred to, in this, that said bankrupt had, at the time of filing his petition in bankruptcy, a contract with said Wesley Goswick, whereby said bankrupt was to receive from said Goswick the sum of Twenty Thousand ($20,000.00) Dollars, being ten per cent (10%) of the purchase price of $200,000 to be paid by one L. E. Foster to said Wesley Goswick under a contract and agreement of sale whereby said Goswick agreed to sell, and said Foster agreed to buy twenty unpatented mining claims located upon or near what is known as Slate Creek, in Gila County, Arizona, said contract between said Goswick and said Foster being in escrow in the Old Dominion Bank at Globe, Arizona, and by the terms of which said Foster agreed to pay said Goswick the sum of Five Thousand ($5,000.00) Dollars on the 8th day of December, 1926; Ten Thousand ($10,000) Dollars on or before the 8th day of June, 1927; Twenty Thousand ($20,000.00) Dollars on or before the 8th [30] day of December, 1927; Eighty-two Thousand Five Hundred ($82,500) Dollars on or before the 8th day of June, 1928, and Eighty-two Thousand Five Hundred ($82,500) Dollars on or before the 8th day of December, 1928, less certain amounts paid monthly and certain royalties to be credited on said purchase price, and that at the time said bankrupt so answered said questions as aforesaid, he had received on account of said contract the amount of Thirty-five Hundred ($3500.00) Dollars, none of which ap-

peared upon the books of the firm of Armstrong, Lewis & Kramer.

That said bankrupt knowingly and fraudulently so answered said questions in order to conceal from said trustee in bankruptcy the payments made and to be made to him under said contract, and that it was material that said bankrupt should reveal said amount of $3,500 and account for the same in order to satisfactorily explain in said bankruptcy proceedings the deficiency of his assets to meet his liabilities; and for the further reason that said bankrupt had further payments coming to him under said contract and said interest in said mining property, which were the property of the trustee in bankruptcy of said estate, and said bankrupt was withholding assets of said estate which should properly be applied to the payment of the claims of the estate; that said bankrupt knowingly and fraudulently so testified that he had no interest in the options of said Wesley Goswick in order to conceal from the trustee the existence of said contract with said Goswick, whereby said bankrupt had already received the sum of $3,500, and under which contract there was still due to said bankrupt the sum of $16,500 (of which sum of $16,500 the amount of $8,000 was paid to said bankrupt within ten days after said questions were so answered by said bankrupt, to wit, on or about the 8th day of June, 1928), and the receipt of [31] which sum of Eight Thousand ($8,000.00) Dollars by said bankrupt was concealed by him from the trustee until the 24th day

of November, 1928, and which said sum of Eight Thousand ($8,000.00) Dollars, has never been delivered to said trustee; all of which sums so becoming due under said contract being the property of said bankrupt estate, and that said false answers were given by said bankrupt for the purpose of deceiving said trustee and concealing from him the existence of said payments theretofore made by said Goswick on said contract and the amounts still due to said bankrupt under said contract.

ELEVENTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act, in that he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

(a) In that on, to wit, the 17th day of April, 1928, the said George W. Shute, the bankrupt named herein, subscribed and swore to an oath to Schedule A (being the schedule of his assets filed herein) before one R. E. Conger, a Notary Public in and for the County of Maricopa, State of Arizona, in the Federal District of Arizona, in which he did declare the said schedule to be a statement of all his debts in accordance with the acts of Congress relating to bankruptcy, which schedule was on the 17th day of April, 1928, filed with the United States District Court for the District of Arizona in the Clerk's office thereof, as a part of this proceeding, said schedule showing only one creditor of the said [32] bankrupt, namely, J. J. Mackay, and that said oath to said schedule was

false as to a material fact in this, that in truth and in fact, there was another creditor of the said bankrupt, namely, The First National Bank of Arizona, a banking corporation which held a promissory note of said bankrupt for the sum of Seven Hundred Fifty ($750.00) Dollars, dated April 7, 1928, which promissory note was at that time unpaid, a liability of said estate and secured by a chattel mortgage upon one Hudson car belonging to the bankrupt, described as 1928 Hudson Sedan, Motor # 495579, Serial #799342, executed by said bankrupt on the 7th day of April, 1928, said car not being scheduled as an asset of said estate, and the amount of Six Hundred Fifty ($650.00) Dollars of the consideration of said note not having been satisfactorily accounted for in these proceedings.

(b) In that on, to wit, the 17th day of April, 1928, the said bankrupt, George W. Shute, did knowingly and fraudulently before one R. E. Conger, a notary public in and for the County of Maricopa, State of Arizona, subscribe to and make a false oath to Schedule B of the schedule of his liability in this estate, in that after being duly sworn, he did declare the said schedule to be a statement of all his assets, both real and personal, in accordance with the Acts of Congress relating to bankruptcy, in that in said Schedule B he listed as [33] his entire assets, real estate of the value of Two Hundred Fifty ($250.00) Dollars; books, prints, and pictures of the value of Twenty-five ($25.00) Dollars; deposits of money in bank and elsewhere, of

Fifteen and 67/100 ($15.67) Dollars; and certain mining stocks listed as of no market value; making a total of non-exempt assets listed of Two Hundred Ninety and 67/100 ($290.67) Dollars; and exempt property as follows: household goods of the value of Two Hundred Fifty ($250.00) Dollars, and other personal property, consisting of a law library and office fixtures of the value of Seven Hundred Fifty ($750.00) Dollars, when in truth and in fact his said assets at that time were in excess of the sum of, to wit, Thirty Thousand ($30,000.00) Dollars; the omission of assets from said schedule being more particularly described as follows, to wit:

1. One Hudson car described as 1928 Hudson Sedan, Motor #495579, Serial #799342, of the value of $900.00.

2. One life insurance policy upon the life of the bankrupt as follows: Policy #3310053, issued by the Mutual Life Insurance Company of New York, dated May 25, 1924, of the cash surrender value of $746.85.

3. Savings account in the First National Bank of Arizona at Phoenix, Arizona, being Account #19061, in the name of Jessie M. Shute, wife of said bankrupt, [34] against which account said bankrupt retained the right to check, the said savings account containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1162.30.

4. One phonograph of the value of $200.00.

5. The sum of $250.00, deposited by the bankrupt with one Arthur LaPrade during the month of December, 1927.

6. One Essex car described as Essex Coach, Serial #640003, of the value of $600.00.

7. The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000.00.

8. One certain contract entered into by and between one Wesley Goswick and the bankrupt, on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of $20,000 out of the proceeds of the sale by the said Wesley Goswick of a cinnabar mining property consisting of twenty unpatented mining claims located upon or near what is known as Slate Creek in the County of Gila, State of Arizona, the title to said property being [35] in the name of said Goswick, and the sale thereof being made to one L. E. Foster, for the sum of $200,000, payable as follows: $5,000 on the 8th day of December, 1926; $10,000 on or before six months from the 8th day of December, 1926; $20,000 on or before one year from the 8th day of December, 1926; $82,500 on or before 18 months from the 8th day of December, 1926, and $82,500 on or before two years from the 8th day of December, 1926, less

certain sums to be paid monthly by the purchaser of said property and less certain royalties which were to be paid by the purchaser as they were received on the smelting returns of the ore taken from said mine, a copy of which said contract between said Goswick and said Foster being held in escrow in the Old Dominion Bank of Globe, Arizona; the said mining property having been owned jointly by the said Wesley Goswick and one William A. Packard, with the exception of such interest as the said bankrupt had therein, which interest of the bankrupt under said contract amounted to the said sum of $20,000, and was payable in an amount of 10% of the payments made by the purchaser at the time they were made by the purchaser; the amount of $16,500 being due on said contract to said bankrupt on the date of the [36] filing of the petition of bankruptcy herein.

9. An undivided partnership interest in the assets of the firm of Armstrong, Lewis & Kramer, of which firm the said bankrupt was a member; the interest of the said bankrupt in the assets of said firm being of the estimated value of Five Thousand ($5,000.00) Dollars.

That said oath to said Schedule B was false as to a material fact in this, that said assets of said bankrupt so omitted from his said schedule were assets belonging to said bankrupt estate, the existence of which said bankrupt was by said omission conceal-

ing from the officers of the bankruptcy court in charge of said proceedings.

(c) In that on, to wit, the 7th day of May, 1928, the said bankrupt, George W. Shute, did knowingly and fraudulently before one R. E. Conger, a notary public in and for the County of Maricopa, State of Arizona, subscribe to and make a false oath to Schedule B of the Amended Schedule of his liabilities in this estate, which said Amended Schedule was on the 8th day of May, 1928, filed with the United States District Court for the District of Arizona, in the Clerk's office thereof, as a part of this proceeding; in that after being duly sworn, he did declare the said Amended Schedule to be a statement of all his assets, both real and personal, in accordance with the Acts of Congress relating to bankruptcy; and that in said Schedule B of said Amended Schedule he [37] listed as his entire assets real estate of the value of Two Hundred Fifty ($250.00) Dollars; books, prints, and pictures of the value of Twenty-five ($25.00) Dollars; deposits of money in banks and elsewhere, Fifteen and 67/100 ($15.67) Dollars; certain mining stocks listed as of no market value, and a twenty-five per cent (25%) interest in the net earnings of Armstrong, Lewis & Kramer, as shown on the books of the firm from the 1st day of April, 1927, the value of said interest not being stated; and a twenty per cent (20%) interest in the office equipment of Armstrong, Lewis & Kramer of the value of Seven Hundred Sixty-nine and 15/100 ($769.15) Dollars; making a total value of non-exempt assets listed of One Thousand

Fifty-nine and 82/100 ($1,059.82) Dollars, exclusive of said partnership interest and exempt property as follows: Household goods of the value of Two Hundred Fifty ($250.00) Dollars; and other personal property consisting of a law library and office fixtures of the value of Seven Hundred Fifty ($750.00) Dollars; when in truth and in fact his said assets at that time were in excess of the sum of Thirty Thousand ($30,000.00) Dollars; the omission of assets from said schedule being more particularly described as follows, to wit:

1. One Hudson car described as 1928 Hudson Sedan, Motor #495579, Serial #799342, of the value of $900.00.

2. One life insurance policy upon the life of the bankrupt as follows: Policy #3310053, issued by the Mutual Life Insurance [38] Company of New York, dated May 25, 1924, of the cash surrender value of $746.85.

3. Savings account in the First National Bank of Arizona at Phoenix, Arizona, being Account #19061, in the name of Jessie M. Shute, wife of said bankrupt, against which account said bankrupt retained the right to check, said savings account containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1162.30.

4. One phonograph of the value of $200.00.

5. The sum of $250.00, deposited by the bankrupt with one Arthur LaPrade during the month of December, 1927.

6. One Essex car described as Essex Coach, Serial #640003, of the value of $600.00;

7. The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000.00.

8. One certain contract entered into by and between one Wesley Goswick and the bankrupt, on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive [39] the sum of $20,000 out of the proceeds of the sale by the said Wesley Goswick of a cinnabar mining property consisting of twenty unpatented mining claims located upon or near what is known as Slate Creek in the County of Gila, State of Arizona, the title to said property being in the name of said Goswick, and the sale thereof being made to one L. E. Foster, for the sum of $200,000 payable as follows: $5,000 on the 8th day of December, 1926; $10,000 on or before six months from the 8th day of December, 1926; $20,000 on or before one year from the 8th day of December, 1926; $82,500 on or before 18 months from the 8th day of December, 1926, and $82,500 on or before two years from the 8th day of December, 1926, less certain sums to be paid monthly by the purchaser of said property and less certain royalties which were to be paid by the purchaser as they were received

on the smelting returns of the ore taken from said mine, a copy of which said contract between said Goswick and said Foster being held in escrow in the Old Dominion Bank of Globe, Arizona; the said mining property having been owned jointly by the said Wesley Goswick and one William A. Packard, with the exception of such interest as the said bankrupt had therein, which interest of the bankrupt [40] under said contract amounted to the said sum of $20,000, and was payable in an amount of ten per cent (10%) of the payments made by the purchaser at the time they were made by the purchaser; the amount of $16,500 being due on said contract to said bankrupt on the date of the filing of the petition in bankruptcy herein.

That said oath to said Amended Schedule B was false as to a material fact in this, that said assets of said bankrupt so omitted from his said schedule were assets belonging to said bankrupt estate, the existence of which said bankrupt was by said omission concealing from the officers of the bankruptcy court in charge of said proceedings.

TWELFTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act, in that he has knowingly and fraudulently, after the filing of the petition in bankruptcy herein withheld from the trustee in the bankruptcy estate documents and papers affecting and relating to the property and affairs of the bankrupt, to the possession of which the trustee is entitled, and the possession of which

is necessary to the trustee for the purpose of collecting in the assets of the bankrupt estate, said documents and papers consisting of:

(a) One lease in which the bankrupt is the lessee of a residence and lot located at 66 West Lynwood Street, in the City of Phoenix, County of Maricopa, [41] State and District of Arizona, the said lease having had paid thereon by said bankrupt prior to the filing of the petition in bankruptcy herein the sum of One Hundred Fifty ($150.00) Dollars for unexpired rent thereon, (with the exception of two days' rent at the rate of Seventy-five ($75.00) Dollars per month), the same being an asset of said estate, and the title to said lease having passed to the trustee by operation of law as of the date of the filing of the bankrupt's petition in bankruptcy herein.

(b) One promissory note signed by Joseph E. Noble, dated the 18th day of October, 1927, for the principal sum of Twelve Hundred ($1,200.00) Dollars, payable to the First National Bank of Arizona, signed by said Joseph E. Noble as principal, and by G. W. Shute, the bankrupt, as surety, which said promissory note was on or about the 27th day of February, 1928, paid by said bankrupt, and which promissory note is an asset of the bankrupt estate, title of which passed to the trustee herein as of the date of the filing of the petition in bankruptcy herein by the said bankrupt.

THIRTEENTH: For the reason that he has failed to keep books of account or records from which his financial condition and business transac-

tions might be ascertained, and has concealed records from which his business transactions might be ascertained. [42]

FOURTEENTH: For the reason that he has at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy transferred real property owned by himself from himself to his wife, with intent to hinder, delay and defraud his creditors; such property being situated in the County of Gila, State of Arizona, and more particularly described as follows, to wit: Lots, 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite; that said transfer was accomplished in the following manner, to wit: That the said bankrupt was the owner of the above-described property as the community property of himself and wife ever since the 20th day of December, 1920, when the same was acquired by him by the payment thereof of the consideration for the purchase thereof from the community funds of himself and the said Jessie M. Shute, acquired by said bankrupt after his marriage to said Jessie M. Shute, and by the giving of a joint promissory note and mortgage as a part of the consideration for the said purchase to one Mary E. Holmes for the sum of Thirty-five Hundred ($3,500.00) Dollars, which promissory note and mortgage was a community liability, the title to said property having been taken in the name of the said Jessie M. Shute, but not as the separate property of the said Jessie M. Shute, and having stood of record as the community property of the bankrupt and his wife from the time

of its acquirement up to the time of the filing of the petition in bankruptcy herein. That in, to wit, the early part of the year, 1928, the said bankrupt, while insolvent within the meaning and intent of the Bankruptcy Act, and not having sufficient property to pay his debts, transferred the above-described property to his said wife, Jessie M. Shute, by disclaiming any interest therein in her favor, and by relinquishing [43] possession thereof to her; all of which was done in contemplation of bankruptcy, and with the intent to hinder, delay and defraud his creditors. That subsequent to the filing of his said petition in bankruptcy, he has continued to aid his wife, the said Jessie M. Shute, in withholding possession of said premises from the trustee of said estate, and employed counsel for her to prevent the delivery of same to the trustee herein, and to prevent the payment of the rents thereof to the trustee herein; that the above-described real estate was and is of the value of, to wit, the sum of Five Thousand ($5,000.00) Dollars, and had, and has, a rental value of, to wit, the sum of Fifty ($50.00) Dollars per month, and has been actually rented at Fifty ($50.00) Dollars per month ever since the filing of the voluntary petition in bankruptcy by the bankrupt; that subsequently to his adjudication in bankruptcy the said bankrupt caused his wife, the said Jessie M. Shute, to file a declaration of homestead upon said premises, and himself had the same recorded in the office of the County Recorder of Gila County on the 18th day of June, 1928, thereby clouding the title of your trustee and carrying out

the disclaimer and relinquishment of his right and title to the real estate and improvements as hereinbefore set forth, in favor of his wife, the said Jessie M. Shute, all of which was done with the intent to hinder, delay and defraud his creditors.

FIFTEENTH: For the reason that he has at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy transferred personal property owned by himself to one A. E. England, with intent to hinder, delay, and defraud his creditors; that said property consisted of one automobile of the value of, to wit, Nine Hundred ($900.00) [44] Dollars, and more particularly described as follows, to wit: 1928 Hudson Sedan, Motor #495579, Serial #799342; that said transfer was accomplished by delivering the said automobile to the said A. E. England to hold and keep as his own, and to store the same in the building occupied by the A. E. England Motors in the City of Phoenix, County of Maricopa, State of Arizona; that said transfer was made in the early part of the year, 1928, and was made in contemplation of bankruptcy; that the said automobile remained in the custody of the said A. E. England up to and subsequent to the adjudication in bankruptcy of the bankrupt in the above-entitled matter until a time some weeks subsequent to said adjudication when the same was purchased from your trustee by the said bankrupt for the sum of Nine Hundred ($900.00) Dollars.

SIXTEENTH: For the reason that he has at a time subsequent to the first day of the twelve

months immediately preceding the filing of his petition in bankruptcy concealed and permitted to be concealed personal property belonging to said bankrupt and bankrupt estate, more particularly described as follows: A savings account numbered 19061, in the First National Bank of Arizona, standing in the name of Jessie M. Shute, but being the community property of said bankrupt, and said Jessie M. Shute, and consisting of funds acquired after marriage by the said bankrupt, of the sum of Eleven Hundred Sixty-two and 30/100 ($1162.30) Dollars; $1,000 or more of which sum was by the said bankrupt withdrawn or permitted to be withdrawn from the said account after the same had been the subject of testimony and examination at a meeting of creditors of the said bankrupt held on the 29th day of May, 1928, for the purpose of placing the same beyond the reach of the trustee and of the Court of Bankruptcy, and which sum has been secreted and concealed from the trustee and the officers of the Court [45] of Bankruptcy, and thereby depriving the estate of said bankrupt of said sum of One Thousand ($1,000.00) Dollars, with intent to hinder, delay and defraud the creditors of said bankrupt.

SEVENTEENTH: For the reason that he has at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy concealed and permitted to be concealed personal property belonging to said bankrupt and bankrupt estate, more particularly described as follows: By receiving and secreting in, to wit, the

month of June, 1928, the sum of to wit, Eight Thousand ($8,000.00) Dollars, paid to said bankrupt by one Wesley Goswick, upon a contract entered into by said Goswick, and said bankrupt prior to the filing of the petition in bankruptcy by the bankrupt herein, which said contract passed by operation of law to your trustee in bankruptcy in these proceedings at the time they were instituted, and which sum of, to wit, Eight Thousand ($8,000.00) Dollars was the property of your trustee in bankruptcy and collected by the said bankrupt without the knowledge or consent of the trustee and he has ever since said time concealed the same from the trustee and the officers of the Bankruptcy Court with intent to hinder, delay and defraud the creditors of said bankrupt.

EIGHTEENTH: For the reason that he has in the course of the proceedings in bankruptcy refused to obey a lawful order of the Court, to wit, the order of said bankrupt court made on the 1st day of May, 1928, requiring said bankrupt to file new schedules or to so amend said schedules theretofore filed by him to conform to the facts and the provisions of the Bankruptcy Act; that said bankrupt subsequent to said order filed what was termed an amended schedule, but that said amended schedule did not comply with [46] said order of the Court dated May 1, 1928, as aforesaid, and did not conform to the facts and the provisions of the Bankruptcy Act, in that said bankrupt knowingly and fraudulently omitted from said amended schedule the following assets belonging to said bankrupt estate, to wit:

1. One Hudson car described as 1928 Hudson Sedan, Motor #495579, Serial #799342, of the value of $900.00.

2. One life insurance policy upon the life of the bankrupt as follows, Policy #3310053, issued by the Mutual Life Insurance Company of New York, dated May 25th, 1924, of the cash surrender value of $746.85.

3. Savings account in the First National Band of Arizona at Phoenix, Arizona, being account #19061, in the name of Jessie M. Shute, wife of said bankrupt, against which account said bankrupt retained the right to check, said savings account containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1162.30.

4. One phonograph of the value of $200.00.

5. The sum of $250.00, deposited by the bankrupt with one Arthur LaPrade during the month of December, 1927.

6. One Essex car described as Essex Coach, Serial #640003, of the value of $600.00.

7. The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000.00.

8. One certain contract entered into by and between one Wesley Goswick and the bankrupt, on or [47] about the 8th day of December, 1926, under and by virtue of the terms of which the

said bankrupt was to receive the sum of $20,000 out of the proceeds of the sale by the said Wesley Goswick of a cinnabar mining property consisting of twenty unpatented mining claims located upon or near what is known as Slate Creek in the County of Gila, State of Arizona, the title to said property being in the name of said Goswick, and the sale thereof being made to one L. E. Foster, for the sum of $200,000, payable as follows: $5,000 on the 8th day of December, 1926; $10,000 on or before six months from the 8th day of December, 1926; $20,000 on or before one year from the 8th day of December, 1926; $82,500 on or before 18 months from the 8th day of December, 1926, and $82,500 on or before two years from the 8th day of December, 1926, less certain sums to be paid monthly by the purchaser of said property and less certain royalties which were to be paid by the purchaser as they were received on the smelting returns of the ore taken from said mine, a copy of which said contract between said Goswick and said Foster being held in escrow in the Old Dominion Bank of Globe, Arizona; the said mining property having been owned jointly by the said Wesley Goswick and one William A. Packard, with the exception of such interest as the said bankrupt had therein, which interest of the bankrupt under said contract amounted to the said sum of $20,000, and was payable in an amount of ten per cent (10%) of the payments made by the purchaser

at the [48] time they were made by the purchaser; the amount of $16,500 being due on said contract to said bankrupt on the date of the filing of the petition in bankruptcy herein.

NINETEENTH: For the reason that he has failed to explain satisfactorily losses of assets and deficiency of assets to meet his liability in this, that for the period commencing January 1st, 1927, and up to and including the date of the filing of his petition in bankruptcy herein by said bankrupt, to wit, the 17th day of April, 1928, said bankrupt had cash assets in the form of income and other amounts received by him during said period of an amount of not less than Twenty-one Thousand Six Hundred Ninety-five and 20/100 ($21,695.20) Dollars; and that after deducting from said amount all expenditures and disbursements thereof testified to by said bankrupt under examination before the referee in bankruptcy at the first meeting of creditors, or revealed from such statements and data as have been produced by said bankrupt in said bankruptcy proceedings, there still remains an amount of not less than Seven Thousand ($7,000.00) Dollars, received by said bankrupt during said period of time, which is totally unaccounted for and the disappearance of which said bankrupt has failed to explain satisfactorily or at all; and said bankrupt has testified under oath at his examination before the referee in bankruptcy, at the first meeting of creditors in said bankruptcy proceedings, that he cannot explain such deficiency.

WHEREFORE, objection is made to the granting of such application for a discharge.

THOMAS W. NEALON,
Trustee in Bankruptcy Objecting to Discharge.
[49]

United States of America,
District of Arizona,—ss.

Thomas W. Nealon, being the trustee in bankruptcy above named, does hereby make solemn oath that the statements contained in the foregoing specifications of objection to discharge of bankrupt, subscribed by him, are true.

THOMAS W. NEALON.

Subscribed and sworn to before me this 19th day of December, 1928.

[Seal] BESS M. WHITE,
Notary Public.

My commission expires June 18, 1931.

[Endorsed]: Filed Dec. 19, 1928. [50]

[Title of Court and Cause.]

CREDITOR'S SPECIFICATIONS OF OBJECTION TO DISCHARGE OF BANKRUPT.

J. J. Mackay, of Phoenix, County of Maricopa, State of Arizona, in the District of Arizona, a creditor of the above-named bankrupt, having a debt against said bankrupt subject to discharge in bankruptcy, and whose claim against said bank-

rupt has been duly filed and allowed in these proceedings, does hereby oppose the granting to said bankrupt of a discharge from his debts, and for the grounds of such opposition does file the following specifications:

FIRST: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act, in that he has knowingly and fraudulently concealed from his trustee property belonging to his estate in bankruptcy as follows:

(a) One Hudson car, described as Hudson Sedan, Motor Number 495579, Serial Number 799342, owned by said bankrupt at the time of filing his petition in bankruptcy, and by him placed in the custody of A. E. England shortly prior to bankruptcy with the intention that he and the said A. E. England should keep said car concealed from said Trustee; and further, by knowingly and [51] fraudulently omitting to schedule said car as an asset of said estate, either in the first schedule of his assets and liabilities filed by him herein, or in the amended schedule of his assets and liabilities filed by him herein, which said amended schedule was filed after an order made by the court upon written mo-

tion of a creditor requiring him so to do. The value of said Hudson car was, to wit, the sum of $900.00.. $900.00

(b) One life insurance policy upon the life of the bankrupt as follows: Policy No. 3310053, said policy having been issued by the Mutual Life Insurance Company of New York, dated May 25th, 1924, said life insurance policy being one in which he had the right to change the beneficary without the consent of the beneficary named therein, and which life insurance policy had a cash surrender value, at the time of the filing of the debtor's petition in bankruptcy of $746.85, said concealment having been made by knowingly and fradulently omitting the same from his schedule of assets and by inserting in the form used, at the place for the listing of insurance policies, the word "None"; and by further stating, under oath, during the bankruptcy examination in the first meeting of creditors that the said policy did not have any loan value; and by failing and refusing to [52] produce said policy until de-

$900.00

Brought forward $900.00

mand was made therefor by said trustee at the continued first meeting of creditors on May 29th, 1928 ..... $746.85

(c) A savings account in the First National Bank of Arizona, at Phoenix, Arizona, being account #19061, in the name of Jessie M. Shute, wife of said bankrupt, but against which account said bankrupt retained the right to check, said savings account being made up from funds acquired by the bankrupt subsequent to the marriage of said bankrupt and said Jessie M. Shute, and containing, on the 4th day of January, 1928, the sum of $3,687.50, and from which account there was withdrawn, on the 27th day of February, 1928, the sum of $1,235.00, paid to the First National Bank of Arizona as payment of a promissory note of one Joseph E. Noble, dated October 18th, 1927, payable to said bank, and which note was signed by said bankrupt, G. W. Shute, as security; and from which savings account there was withdrawn, three days before said bankrupt filed his voluntary petition in bankruptcy herein, on, to wit, April 14, 1928, the sum of $1,500.00, which amount

was delivered to the son-in-law of said bankrupt, namely, Leslie Creed, leaving the amount of the said savings account in said bank on the day of filing said petition in bankruptcy, the sum of $1,162.30;

Forward [53]	$1,646.85
Brought forward	$1,646.85
that said concealment was effected by knowingly and wilfully omitting any mention of said savings account or deposit from his schedules filed in said bankruptcy proceedings, and said omission being made for the purpose of concealing the existence thereof from the trustee and thereby hiding from him the said sum of money which was the community property of the said bankrupt and his wife, the said Jessie M. Shute, and part of said bankrupt estate; and by knowingly and fraudulently concealing from said trustee the existence of said promissory note of Joseph E. Noble, paid by said bankrupt as aforesaid, and by knowingly and fraudulently concealing from said trustee the transfer of said amount of $1500.00 from said savings account to said Leslie Creed...	$3687.50

(d) One certain contract entered into by and between one Wesley Goswick and the bankrupt, on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of $20,000 out of the proceeds of the sale by the said Wesley Goswick of a cinnabar mining property consisting of twenty unpatented mining claims located upon or near what is known as Slate Creek in the County of Gila, State of Arizona, the title to said property being in the name of said Goswick, and the

Forward [54]	$5,334.35
Brought forward	$5,334.35

sale thereof being made to one L. E. Foster, for the sum of $200,000, payable as follows: $5,000 on the 8th day of December, 1926; $10,000 on or before six months from the 8th day of December, 1926; $20,000 on or before one year from the 8th day of December, 1926; $82,500 on or before 18 months from the 8th day of December, 1926, and $82,500 on or before two years from the 8th day of December, 1926, less certain sums to be paid monthly by the purchaser of said property and less certain

royalties which were to be paid by the purchaser as they were received on the smelting returns of the ore taken from said mine, a copy of which said contract between said Goswick and said Foster being held in escrow in the Old Dominion Bank of Globe, Arizona; the said mining property having been owned jointly by the said Wesley Goswick and one William A. Packard, with the exception of such interest as the said bankrupt had therein, which interest of the bankrupt under said contract amounted to the said sum of $20,000, and was payable in an amount of 10% of the payments made by the purchaser at the time they were made by the purchaser; said contract having been recognized by the said Wesley Goswick and the said William A. Packard, and the payment of $500 having been made thereon, on or about the 8th day of December, 1926, to the said bankrupt by the said Wesley Goswick and William A. Packard, and $1,000

Forward [55]	$5,334.35
Brought forward	$5,334.35

having been on or about the 8th day of June, 1927, paid thereon to the

said bankrupt by the said Goswick and said Packard, and the further sum of $2,000 being paid to the said bankrupt in the month of December, 1927, by the said Wesley Goswick, for and on behalf of the said Wesley Goswick and William A. Packard; and subsequent to the adjudication in bankruptcy in, to wit, the month of June, 1928, a further sum of $8,000 having been paid to said bankrupt, on said contract, by the said Wesley Goswick for and on behalf of himself and said William A. Packard; the said Wesley Goswick having on, to wit, August 20, 1927, assumed the payment to the said bankrupt of all subsequent payments to him under said contract on behalf of himself and said Packard, and there being still due to the trustee in bankruptcy, as the successor in interest of the said bankrupt, a further sum which, with the payments made aforesaid to said bankrupt, would make a total sum of $20,000, said sum, by said original contract, having become due on December 8, 1928, but some extension of the time of the making of the payment of the sum due by the purchaser thereon having been made prior to

that time without the consent of your trustee in bankruptcy; the existence of the said contract and of the payments made thereon and to be made thereon having been knowingly and fraudulently concealed from your trustee by the knowing and wilful omission by the bankrupt

Forward [56]	$5,334.35
Brought forward	$5,334.35

from his schedules of said property as one of the assets of said estate, and said omission being made with the intent and design of keeping your trustee in ignorance of the existence thereof and of the payments made and to be made thereon; and the further concealment of said contract and of payments made thereunder and to be made thereunder, by the testimony under oath of said bankrupt at the first meeting of creditors at which said bankrupt testified that he had never received from said Goswick any sum, in connection with the sale of said cinnabar property, except the amount of $500, which amount he testified was a gift to him made in the month of December, 1927, and said bankrupt further testified that no further or

other amounts were payable to him by said Goswick, and that he, said bankrupt, had no interest in said option and sale of said mining property made by said Goswick to said L. E. Foster..... $16,500.00

(e) The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as follows: Lots 1, 2, 3, 4 and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000, which said property was, up to the time that the title thereof passed to your trustee by operation of law on the filing of the petition in bankruptcy, the property of said bankrupt and purchased with funds acquired by him subsequent to the marriage of said bankrupt to the said Jessie M. Shute, together with a purchase money mortgage given by himself and the said Jessie M. Shute, as a part of the consideration thereof, the said mortgage being a community liability of the said bankrupt; said concealment having been effected by the bankrupt knowingly

Forward [57] $21,834.35

Brought forward $21,834.35

and fraudulently omitting any description thereof from his schedules in bankruptcy filed herein, the said property being situated in the County of Gila, and the said bankruptcy proceedings being in Maricopa County, and thus withholding from the trustee any information as to its existence, and further by the said bankrupt having in, to wit, the month of April, 1928, fraudulently and with the intent to conceal said property from the said trustee, disclaimed any interest therein in favor of his wife, Jessie M. Shute, and delivered possession thereof to her, and having since said time withheld possession thereof from said trustee and prevented the collection of the rents thereof by the said trustee, which rents amounted to the sum of, to wit, $50.00 per month; and further by causing the said Jessie M. Shute, subsequent to the adjudication of bankruptcy herein, to file a declaration of homestead on said premises

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Forward [58] $21,834.35

Forward $21,834.35

in her own name and by employing for and on behalf of the said Jessie M. Shute an attorney at law, one

Clifton Matthews, of Globe, Arizona, to obstruct the securing of the possession thereof and the rents therefrom, by the trustee; the said declaration of homestead having been filed in the office of the County Recorder of said Gila County, Arizona, on the 18th day of June, 1928, at 4:45 o'clock P. M., in Book 1 of Homesteads, pages 121 and 122, at the request of said bankrupt..... $5,000.00

(f) One Essex car, described as Essex Coach, Serial Number 640003, of the value of, to wit, the sum of $600.00, the property of said bankrupt estate, having been concealed by said bankrupt knowingly and fraudulently omitting the same from his schedules, with the intention of concealing from the trustee the existence thereof, the said car being further concealed by the placing of a license and certificate of title thereof in the name of said Jessie M. Shute, upon the pretense that the same was a gift by the bankrupt to said Jessie M. Shute, said bankrupt having been totally insolvent and not having sufficient assets to pay his

debts for more than ten (10) years prior to the alleged gift..... $600.00

(g) The sum of $995.00, being the

Forward [59] $27,434.35

Brought forward $27,434.35

amount which said bankrupt paid during the month of December, 1927, to A. E. England by check on the First National Bank of Arizona, signed by said G. W. Shute, bankrupt, as a payment on a car for one Virginia L. Wentworth, of Globe, Arizona, which payment said bankrupt testified, under oath, at the first meeting of creditors, on the 29th day of May, 1928, was made by him for said Virginia L. Wentworth in December, 1927, out of moneys paid to him by said Virginia L. Wentworth in December, 1927, but which money so paid to him by said Virginia L. Wentworth did not appear in any statement or data furnished said trustee by said bankrupt, and has never been accounted for by said bankrupt, but has been knowingly and fraudulently concealed by said bankrupt from said trustee..... $995.00

(h) The sum of $250, which said bankrupt knowingly and wilfully and with intent to conceal same from the

trustee omitted from his schedule of assets filed herein, which said sum of $250 was a deposit made by said bankrupt with one Arthur LaPrade during the month of December, 1927, for the purpose of investment, and which subsequent to the adjudication in bankruptcy was returned to said bankrupt by said Arthur LaPrade. $250.00

(i) One phonograph of the value of approximately $200, which phonograph said bankrupt knowingly and fraudulently concealed from said trustee by omitting same from his schedule of assets filed herein and by testifying under oath at the first meeting of creditors that he had no musical instrument $200.00

Forward [60] $28,679.35

The total amount of the concealment of property from your trustee by the methods hereinabove described being of the value of to wit, the sum of $28,879.35 ..... $28,879.35

SECOND: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the bankruptcy act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to

testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. You have a car at the present time, have you not?
>
> A. I bought a car when I came down here, a Hudson, from my brother-in-law, and I paid $100 a month on it until it was paid for; then I traded it in on another car from England, and then traded that in on another one, which is the car I have now; there is probably $1,000 due on it. [61]

That said answer of said bankrupt was false as to a material fact in this, that the entire purchase price of said last-named car had been paid, and that there was no amount whatever due to said England thereon, and that said car was at said time an asset of said bankrupt estate, which was being concealed from said trustee by said bankrupt and said A. E. England, and said answer was given for the purpose of deceiving the trustee into believing that the bankrupt estate had no interest in said car by reason of the fact that $1,000 of the purchase price was due thereon at said time, when in truth and in fact no part of the purchase price was due thereon at said time.

THIRD: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the bankruptcy act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. (Referring to Hudson car owned by said bankrupt at the time of filing his petition in bankruptcy.) You have made no payments except the work you have done for him?
>
> A. That is about the way it would figure out; I don't think I made any cash payments at all. [62]

That said answer as given by said bankrupt was false as to a material fact in that cash payments had been made on said Hudson car by said bankrupt, as said bankrupt well knew at the time he so answered said question, and that said car was entirely paid for, and was at the time said answer was given an asset of said estate, and should have been delivered by said bankrupt, to said trustee, and that said answer was knowingly and fraudu-

lently given by said bankrupt for the purpose of deceiving the trustee into the belief that a vendor's lien existed against said car in excess of the value thereof, when in truth and in fact said car was entirely paid far.

FOURTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. You did not schedule it? (Referring to Hudson car owned by said bankrupt at the date petition in bankruptcy was filed).
>
> A. I turned it back. [63]

That said answer so given by said bankrupt was false as to a material fact because, in truth and in fact, said car had not been turned back, but was being held by said A. E. England, acting in collusion with the bankrupt, for the use of said bankrupt and for the purpose of concealing the same from the trustee of said bankrupt estate,

and the said car was not scheduled for the purpose of further aiding said bankrupt and said England in the concealment of said car from the trustee.

FIFTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. Since that time (January, 1924) how much have you received from the firm's business? (Referring to the firm of Armstrong, Lewis & Kramer).
>
> A. Well, I can only give an approximation, but I think it is pretty close. I think the first year I received about $5,500; that was 1924; in 1925 I received between $5,500 and $6,000; I think in 1926 it was about $8,000; I think the last year I received somewhere in the neighborhood of $10,000; that is about right, I think. [64]

That said answer as given by said bankrupt was

false as to a material fact in this that said bankrupt stated that he received from the firm's business, being the firm of Armstrong, Lewis & Kramer, in which said bankrupt was, and had been since the year 1924, a partner, in the neighborhood of $10,000 in the year 1927, when in truth and in fact said bankrupt received from the business of said firm of Armstrong, Lewis & Kramer, during the year 1927, the amount of $15,250, and that the difference between said amount of $10,000, which said bankrupt testified he had received from said firm's business during the year 1927, and said amount of $15,250, which was the true amount received by said bankrupt from said firm's business during the year 1927, to wit, the sum of $5,250.00, constituted an asset of said bankrupt estate which should have been applied to the indebtedness of said bankrupt, and which amount it was incumbent upon said bankrupt to account for in order to satisfactorily explain the deficiency of his assets to meet his liabilities, and the amount of his receipts, the dissipation of which it was incumbent on him to explain satisfactorily in said bankruptcy proceedings, and that said answer was knowingly and fraudulently given by said bankrupt for the purpose of deceiving said trustee as to the true amount received by him from the firm of Armstrong, Lewis & Kramer during the year 1927.

SIXTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when

examined before the referee at the first [65] meeting of creditors, after having been duly sworn by the referee in bankruptcy to testify to the whole truth in said matter, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. How much have you drawn from the firm (being the firm of Armstrong, Lewis & Kramer) since the first of the year?
>
> A. I think about $500 a month. There has been no dividend in April.

That said answer of said bankrupt was false as to a material fact in this, that said bankrupt stated that he had drawn about $500 a month since the first of the year (being the year 1928) when in truth and in fact said bankrupt had received from said firm of Armstrong, Lewis & Kramer between the first day of January, 1928, and the date of filing said petition in bankruptcy on April 17, 1928, the amount of $2,450.00; that said bankrupt further stated that there had been no dividend in April (being April, 1928) when in truth and in fact said bankrupt had received from said firm of Armstrong, Lewis & Kramer a dividend in the amount of $775.00 on the 10th day of April, 1928, which said amount of $775.00 said bankrupt had

in his possession seven (7) days before filing his petition in bankruptcy, and that it was incumbent upon said bankrupt to account for the expenditure of said sum of $775.00 in order to satisfactorily explain the deficiency of his assets to meet his liabilities, and the disappearance of all the bankrupt's funds in bank except the [66] amount scheduled by him in his voluntary petition in bankruptcy filed April 17, 1928, to wit, the amount of $15.67.

SEVENTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false statement in and in relation to his proceedings in bankruptcy as follows:

That he has knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. In addition to that (referring to receipts from the firm of Armstrong, Lewis & Kramer) then, there should be other amounts that you have received in order to make the books complete?
>
> A. That depends on the way you look at it. You will remember I told you about the little

block of stock we sold after we came down here. There was also a little Mrs. Shute owned in the Iron-Blossom, I think it was called; there was 100 shares of that. We sold that and I used the money. There may be two or three small instances like that, but except in very small items of that kind, the income was from the firm.

That said answer of said bankrupt was false as to a material fact in this, that said bankrupt received, in truth and in fact, during the period between January 1st, 1926, and the date of the filing of his petition in bankruptcy, to wit, the 17th day of April, 1928, other income outside of the income received from the firm, in large amounts, [67] to wit, the amount of at least $4,000 during said period of time, and that in making said statement and answering said question as he did, said bankrupt was concealing said amount of $4,000 which he had received in income independent of the income received from the firm of Armstrong, Lewis & Kramer, during the period from the first day of January, 1926, to the 17th day of April, 1928, the receipt of $3,000 of said sum of $4,000 being payments made by one Wesley Goswick to said bankrupt during the year 1927, on a contract existing between said bankrupt and said Wesley Goswick, which contract passed to the trustee by operation of law upon the filing of the voluntary petition in bankruptcy filed herein by said bankrupt, but the existence of which contract was concealed from the trustee, and that said answer was knowingly

and fraudulently made by said bankrupt for the purpose of deceiving said trustee into believing that he had not received any income outside of the income received from the firm of Armstrong, Lewis & Kramer, and that it was material that said bankrupt should truthfully report his entire income during said period and account for same in order to satisfactorily explain in said bankruptcy proceedings the deficiency of his assets to meet his liabilities.

EIGHTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a [68] false statement in and in relation to his proceedings in bankruptcy, as follows:

That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. During all of this period (period said bankrupt had been with the firm of Armstrong, Lewis & Kramer) did you receive any large sums of money from any other source, other than those you have testified to?
>
> A. I think I have testified to all of them, either at this hearing or the other one.

That the answer of said bankrupt to said question was false as to a material fact in this, that said bankrupt in truth and in fact had not testified as to amounts received by him during the period between January 1st, 1926, and the date of the filing of his petition in bankruptcy, to wit, the 17th day of April, 1928, and that in truth and in fact, said bankrupt had received during said period other income outside of the income received from the firm, in large amounts, to wit, the amount of at least $4,000 during said period of time, and that said bankrupt had not testified at any time as to the receipt by him of said amount of $4,000 received by him during said period, and that in making said statement and answering said question as he did, the said bankrupt was concealing said amount of at least $4,000 which he had received in income independent of the income received from the firm of Armstrong, Lewis & Kramer during said period between the 1st day of January, 1926, and said 17th day of April, 1928, and that it was material that said bankrupt should truthfully report his entire income during said period and account for the same in order to explain, in the bankruptcy [69] proceedings, the deficiency of his assets to meet his indebtedness, and that said answer of said bankrupt was knowingly and fraudulently made for the purpose of deceiving said trustee into believing that said bankrupt had not received any large amounts of money from any other source than the firm of Armstrong, Lewis & Kramer.

NINTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act, in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made and rendered a false statement in and in relation to his proceedings in bankruptcy as follows:

That he knowingly and fraudulently made a false oath in answering the following questions propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. You have no interest in any mining property? A. None at all.
>
> Q. Any mining claims? A. No.
>
> Q. Have you represented any companies over there in any way as counsel from whom you have received fees since being in Phoenix?
>
> A. I can not think of any. It would be on the books here if I have.
>
> Q. You have received nothing that would not show on the books of Armstrong, Lewis & Kramer? A. I don't think so. [70]
>
> Q. From Globe companies or from interests you have there? A. I don't think so.

That said answers of said bankrupt to said questions and each of said answers are false as to a material fact, in this, that said bankrupt had an interest in mining property at the time of filing

his petition in bankruptcy, to wit, a contract with one Wesley Goswick, whereby said bankrupt was to receive from said Wesley Goswick the sum of $20,000, being 10% of the purchase price of $200,000 to be paid by one L. E. Foster to said Wesley Goswick under a contract and agreement of sale whereby said Wesley Goswick agreed to sell and said L. E. Foster agreed to buy twenty unpatented mining claims located upon or near what is known as Slate Creek, in Gila County, Arizona, said contract between said Goswick and said Foster being in escrow in the Old Dominion Bank at Globe, Arizona, and by the terms of which said Foster agreed to pay said Goswick the sum of $5,000 on the 8th day of December, 1926; $10,000 on or before the 8th day of June, 1927; $20,000 on or before the 8th day of December, 1927; $82,500 on or before the 8th day of June, 1928, and $82,500 on or before the 8th day of December, 1928, less certain amounts paid monthly and certain royalties to be credited on said purchase price; and that at the time said bankrupt so answered said questions as aforesaid he had received on account of said contract the amount of $3,500.00, none of which appeared upon the books of the firm of Armstrong, Lewis & Kramer; that said bankrupt knowingly and fraudulently concealed the receipt of said amount and of said payments under said contract from the trustee in bankruptcy, and that it was material that said bankrupt should reveal said amount of $3,500 and account for [71] the same in order to satisfactorily explain the deficiency of

his assets to meet his liabilities; and for the further reason that said bankrupt had further payments coming from said contract and said interest in said mining property, which were the property of the trustee of said bankrupt estate, and that by concealing the existence of said contract from said trustee in bankruptcy, said bankrupt was withholding assets from said estate which should properly be applied to the payment of the claims of said estate.

TENTH: For the reason that the bankrupt herein committed an offense punishable by imprisonment under the Bankruptcy Act in that, in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made and rendered a false statement in and in relation to his proceedings in bankruptcy, as follows:

That he knowingly and fraudulently made a false oath in answering the following questions propounded to him under examination at the first meeting of creditors, as answered by him:

Q. When was this $500 payment received from Mr. Goswick?

A. In December, 1927.

Q. Have you ever received any other amounts from him?

A. Only for fees; they would go into the firm.

Q. This $500 was not fees? A. No.

Q. Have you any interest in these options of Goswick's? A. No. [72]

Q. You do not expect to receive any other amounts from him other than this $500?

A. No.

Q. If he should send you any more money you would be surprised, would you?

A. I most certainly would.

That said answers of said bankrupt to said questions were, and each of said answers was, false as to a material fact in this, that said bankrupt received from said Goswick during the month of December, 1927, a payment of $2,000, and that the said bankrupt had received from said Goswick, at the time he so testified, other amounts, besides the sum of $2,000 of, to wit, $1500, in addition to said amount of $500, the receipt of which was testified to by said bankrupt, and that at the time said bankrupt so testified he, in truth and in fact, had an interest in the options of the said Wesley Goswick herein referred to, in this, that said bankrupt had, at the time of filing his petition in bankruptcy, a contract with said Wesley Goswick, whereby said bankrupt was to receive from said Goswick the sum of $20,000, being 10% of the purchase price of $200,000 to be paid by one L. E. Foster to said Wesley Goswick under a contract and agreement of sale whereby said Goswick agreed to sell, and said Foster agreed to buy twenty unpatented mining claims located upon or near what is known as Slate Creek, in Gila County, Arizona, said contract be-

tween said Goswick and said Foster being in escrow in the Old Dominion Bank at Globe, Arizona, and by the terms of which said Foster agreed to pay said Goswick the sum of $5,000 on the 8th day of December, 1926; $10,000 on or before the 8th day of June, 1927; $20,000 on or before the 8th day of December, 1927; $82,500 on or before the 8th day [73] of June, 1928, and $82,500 on or before the 8th day of December, 1928, less certain amounts paid monthly and certain royalties to be credited on said purchase price, and that at the time said bankrupt so answered said questions as aforesaid, he had received on account of said contract the amount of $3,500, none of which appeared upon the books of the firm of Armstrong, Lewis & Kramer.

That said bankrupt knowingly and fraudulently so answered said questions in order to conceal from said trustee in bankruptcy the payments made and to be made to him under said contract, and that it was material that said bankrupt would reveal said amount of $3,500 and account for the same in order to satisfactorily explain in said bankruptcy proceedings the deficiency of his assets to meet his liabilities; and for the further reason that said bankrupt had further payments coming to him under said contract and said interest in said mining property, which were the property of the trustee in bankruptcy of said estate, and said bankrupt was withholding assets of said estate which should properly be applied to the payment of the claims of the estate; that said bankrupt knowingly and fraudulently so testified that he had no interest in

the options of said Wesley Goswick in order to conceal from the trustee the existence of said contract with said Goswick, whereby said bankrupt had already received the sum of $3,500, and under which contract there was still due to said bankrupt the sum of $16,500 (of which sum of $16,500 the amount of $8,000 was paid to said bankrupt within 10 days after said questions were so answered by said bankrupt, to wit, on or about the 8th day of June, 1928) and the receipt of which sum of $8,000 by said bankrupt was concealed by him from the trustee until the 24th day of November, 1928, [74] and which said sum of $8,000 has never been delivered to said trustee; all of which sums so becoming due under said contract being the property of said bankrupt estate, and that said false answers were given by said bankrupt for the purpose of deceiving said trustee and concealing from him the existence of said payments theretofore made by said Goswick on said contract and the amounts still due to said bankrupt under said contract.

ELEVENTH: For the reason that the bankrupt herein committed an offense punishable by imprisonment under the Bankruptcy Act, in that he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy as follows:

(a) In that on, to wit, the 17th day of April, 1928, the said George W. Shute, the bankrupt named herein, subscribed and swore to an oath to Schedule A (being the schedule of his assets filed herein) before one R. E. Conger, a notary public

in and for the County of Maricopa, State of Arizona, in the Federal District of Arizona, in which he did declare the said schedule to be a statement of all his debts in accordance with the acts of Congress relating to bankruptcy, which schedule was on the 17th day of April, 1928, filed with the United State District Court for the District of Arizona in the Clerk's office thereof, as a part of this proceeding, said schedule showing only one creditor of the said bankrupt, namely, J. J. Mackay, and that said oath to said schedule was false as to a material fact in this, that in truth and in fact, there was another creditor of the said bankrupt, namely, The First National Bank of Arizona, a banking corporation [75] which held a promissory note of said bankrupt for the sum of Seven Hundred Fifty (750.00) Dollars, dated April 7, 1928, which promissory note was at that time unpaid, a liability of said estate and secured by a chattel mortgage upon one Hudson car belonging to the bankrupt, described as 1928 Hudson Sedan, Motor #495579, Serial #799342, executed by said bankrupt on the 7th day of April, 1928, said car not being scheduled as an asset of said estate, and the amount of $650.00 of the consideration of said note not having been satisfactorily accounted for in these proceedings.

(b) In that on, to wit, the 17th day of April, 1928, the said bankrupt, George W. Shute, did knowingly and fraudulently before one R. E. Conger, a notary public in and for the County of Maricopa, State of Arizona, subscribe to and make a false oath to Schedule B of the schedule of his

liability in this estate, in that after being duly sworn, he did declare the said schedule to be a statement of all his assets, both real and personal, in accordance with the Acts of Congress relating to bankruptcy, in that in said Schedule B, he listed as his entire assets, real estate of the value of Two Hundred Fifty ($250.00) Dollars; books, prints, and pictures of the value of Twenty-five ($25.00) Dollars; deposits of money in the bank and elsewhere, of Fifteen and 67/100 ($15.67) Dollars; and certain mining stocks listed as of no market value; making a total of nonexempt assets listed of Two Hundred Ninety and 67/100 ($290.67) Dollars; and exempt property as follows: household goods of the value of Two Hundred Fifty ($250.00) Dollars, and other personal property, consisting of a law library and office fixtures of the value of Seven Hundred Fifty ($750.00) Dollars, when in truth and in fact his [76] said assets at that time were in excess of the sum of, to wit, Thirty Thousand ($30,000.00) Dollars; the omissions of assets from said schedule being more particularly described as follows, to wit:

(1) One Hudson car described as 1928 Hudson Sedan, Motor #495579, Serial #799342, of the value of $900.00.

(2) One life insurance policy upon the life of the bankrupt as follows: Policy #3310053, issued by the Mutual Life Insurance Company of New York, dated May 25, 1924, of the cash surrender value of $746.85.

(3) Savings account in the First National Bank of Arizona at Phoenix, Arizona, being Account #19061, in the name of Jessie M. Shute, wife of said bankrupt, against which account said bankrupt retained the right to check, the said savings account containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1,162.30.

(4) One phonograph of the value of $200.00.

(5) The sum of $250.00, deposited by the bankrupt with one Arthur LaPrade during the month of December, 1927.

(6) One Essex car described as Essex Coach, Serial #640003, of the value of $600.00.

(7) The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000.00.

(8) One certain contract entered into by and between one Wesley Goswick and the bankrupt, on or [77] about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of $20,000 out of the proceeds of the sale by the said Wesley Goswick of a cinnabar mining property consisting of twenty unpatented mining claims located upon or near what is known as Slate Creek in the County of Gila, State of Arizona, the title to said property being in the name of said Goswick, and the sale thereof be-

ing made to one L. E. Foster, for the sum of $200,000, payable as follows: $5,000 on the 8th day of December, 1926; $10,000 on or before six months from the 8th day of December, 1926; $20,000 on or before one year from the 8th day of December, 1926; $82,500 on or before 18 months from the 8th day of December, 1926, and $82,500 on or before two years from the 8th day of December, 1926, less certain sums to be paid monthly by the purchaser of said property and less certain royalties which were to be paid by the purchaser as they were received on the smelting returns of the ore taken from said mine, a copy of which said contract between said Goswick and said Foster being held in escrow in the Old Dominion Bank of Globe, Arizona; the said mining property having been owned jointly by the said Wesley Goswick and one William A. Packard, with the exception of such interest as the said bankrupt had therein, which interest of the bankrupt under said contract amounted to the said sum of $20,000, and was payable in an amount of 10% of the payments made by the purchaser at the time they were made by the purchaser; the amount of $16,500 being [78] due on said contract to said bankrupt on the date of the filing of the petition of bankruptcy herein.

(9) The undivided partnership interest in the assets of the firm of Armstrong, Lewis and Kramer, of which firm the said bankrupt was a member; the interest of the said bankrupt in the assets of said

firm being of the estimated value of Five Thousand ($5,000.00) Dollars.

That said oath to said Schedule B was false as to a material fact in this, that said assets of said bankrupt so omitted from his schedule were assets belonging to said bankrupt estate, the existence of which said bankrupt was by said omission concealing from the officers of the bankruptcy court in charge of said proceedings.

(c) In that on, to wit, the 7th day of May, 1928, the said bankrupt, George W. Shute, did knowingly and fraudulently before one R. E. Conger, a notary public in and for the County of Maricopa, State of Arizona, subscribe to and make a false oath to Schedule B of the amended schedule of his liabilities in this estate, which said amended schedule was on the 8th day of May, 1928, filed with the United States District Court for the District of Arizona, in the Clerk's office thereof, as a part of this proceedings; in that after being duly sworn, he did declare the said amended schedule to be a statement of all his assets, both real and personal, in accordance with the Acts of Congress relating to bankruptcy; and that in said Schedule B of said amended schedule he listed as his entire assets real estate of the value of Two Hundred Fifty ($250.00) Dollars; books, prints, [79] and pictures of the value of Twenty-five ($25.00) Dollars; deposits of money in banks and elsewhere, Fifteen and 67/100 ($15.67) Dollars; certain mining stocks listed as of no market value, and a 25% interest in the net earnings of Armstrong, Lewis and Kramer, as

shown on the books of the firm from the 1st day of April, 1927, the value of said interest not being stated; and a 20% interest in the office equipment of Armstrong, Lewis and Kramer of the value of Seven Hundred Sixty-nine and 15/100 ($769.15) Dollars; making a total value of nonexempt assets listed of One Thousand Fifty-nine and 82/100 ($1.059.82) Dollars, exclusive of said partnership interest, and exempt property as follows: Household goods of the value of Two Hundred Fifty ($250.00) Dollars; and other personal property consisting of a law library and office fixtures of the value of Seven Hundred Fifty ($750.00) Dollars; when in truth and in fact said assets at that time were in excess of the sum of Thirty Thousand ($30,-000.00) Dollars; the omissions of assets from said schedule being more particularly described as follows, to wit:

(1) One Hudson car described as 1928 Hudson Sedan, Motor #495579, Serial #799342, of the value of $900.00.

(2) One life insurance policy upon the life of the bankrupt as follows: Policy #3310053, issued by the Mutual Life Insurance Company of New York, dated May 25, 1924, of the cash surrender value of $746.85.

(3) Savings account in the First National Bank of Arizona at Phoenix, Arizona, being Account #19061, in the name of Jessie M. Shute, wife of said bankrupt, against which account said bankrupt retained the [80] right to check, said savings ac-

count containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1162.30.

(4) One phonograph of the value of $200.00.

(5) The sum of $250.00, deposited by the bankrupt with one Arthur LaPrade during the month of December, 1927.

(6) One Essex car described as Essex Coach, Serial #640003, of the value of $600.00.

(7) The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000.00.

(8) One certain contract entered into by and between one Wesley Goswick and the bankrupt, on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of $20,000 out of the proceeds of the sale by the said Wesley Goswick of a cinnabar mining property consisting of twenty unpatented mining claims located upon or near what is known as Slate Creek in the County of Gila, State of Arizona, the title to said property being in the name of said Goswick, and the sale thereof being made to one L. E. Foster, for the sum of $200,000, payable as follows: $5,000 on the 8th day of December, 1926; $10,000 on or before six months from the 8th day of December, 1926; $20,000 on or before one year from the 8th day of December, 1926; $82,500 on or before 18 months from the 8th day of December, 1926, and $82,500

on or before two [81] years from the 8th day of December, 1926, less certain sums to be paid monthly by the purchasers of said property and less certain royalties which were to be paid by the purchaser as they were received on the smelting returns of the ore taken from said mine, a copy of which said contract between said Goswick and said Foster being held in escrow in the Old Dominion Bank of Globe, Arizona; the said mining property having been owned jointly by the said Wesley Goswick and one William A. Packard, with the exception of such interest as the said bankrupt had therein, which interest of the bankrupt under said contract amounted to the said sum of $20,000, and was payable in an amount of 10% of the payments made by the purchaser at the time they were made by the purchaser; the amount of $16,500 being due on said contract to said bankrupt on the date of the filing of the petition in bankruptcy herein.

That said oath to said Amended Schedule B was false as to a material fact in this, that said assets of said bankrupt so omitted from his said schedule were assets belonging to said bankrupt estate, the existence of which said bankrupt was by said omission concealing from the officers of the bankruptcy court in charge of said proceedings.

TWELFTH: For the reason that the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act, in that he has knowingly and fraudulently, after the filing of the petition in bankruptcy herein withheld from the trustee in the bankruptcy estate documents and

papers affecting and relating [82] to the property and affairs of the bankrupt, to the possession of which the trustee is entitled, and the possession of which is necessary to the trustee for the purpose of collecting in the assets of the bankrupt estate, said documents and papers consisting of:

(a) One lease in which the bankrupt is the lessee of a residence and lot located at 66 West Lynwood Street, in the City of Phoenix, County of Maricopa, State and District of Airzona, the said lease having had paid thereon by said bankrupt prior to the filing of the petition in bankruptcy herein the sum of One Hundred Fifty ($150.00) Dollars for unexpired rent thereon (with the exception of two days rent at the rate of Seventy-five ($75.00) Dollars per month), the same being an asset of said estate, and the title to said lease having passed to the trustee by operation of law as of the date of the filing of the bankrupt's petition in bankruptcy herein.

(b) One promissory note signed by Joseph E. Noble, dated the 18th day of October, 1927, for the principal sum of Twelve Hundred ($1,200.00) Dollars, payable to the First National Bank of Arizona, signed by said Joseph E. Noble as principal, and by G. W. Shute, the bankrupt, as surety, which said promissory note was on or about the 27th day of February, 1928, paid by said bankrupt, and which promissory note is an asset of the bankrupt estate, title to which passed to the trustee herein as of the date of the filing of the petition in bankruptcy herein by the said bankrupt.

THIRTEENTH: For the reason that he has failed to keep books of account or records from which his financial condition and business [83] transactions might be ascertained, and has concealed records from which his business transactions might be ascertained.

FOURTEENTH: For the reason that he has at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy transferred real property owned by himself from himself to his wife, with intent to hinder, delay and defraud his creditors; such property being situated in the County of Gila, State of Arizona, and more particularly described as follows, to wit: Lots, 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite; that said transfer was accomplished in the following manner, to wit: That the said bankrupt was the owner of the above-described property as the community property of himself and wife ever since the 20th day of December, 1920, when the same was acquired by him by the payment thereof of the consideration for the purchase thereof from the community funds of himself and the said Jessie M. Shute, acquired by said bankrupt after his marriage to said Jessie M. Shute, and by the giving of a joint promissory note and mortgage as a part of the consideration for the said purchase to one Mary E. Holmes for the sum of Thirty-five Hundred ($3500.00) Dollars, which promissory note and mortgage was a community liability, the title to said property having been taken in the name of the said Jessie M.

Shute, but not as the separate property of the said Jessie M. Shute, and having stood of record as the community property of the bankrupt and his wife from the time of its acquirement up to the time of the filing of the petition in bankruptcy herein. That in, to wit, the early part of the year 1928, the said bankrupt, while insolvent within the meaning and intent of the Bankruptcy Act, and not having sufficient property to pay his debts, transferred the above-described property to his said wife, Jessie M. Shute, by disclaiming any interest therein in her favor, and by relinquishing possession thereof to her; all of which was done in [84] contemplation of bankruptcy, and with the intent to hinder, delay and defraud his creditors. That subsequent to the filing of his said petition in bankruptcy, he has continued to aid his wife, the said Jessie M. Shute, in withholding possession of said premises from the trustee of said estate, and employed counsel for her to prevent the delivery of same to the trustee herein, and to prevent the payment of the rents thereof to the trustee herein; that the above-described real estate was and is of the value of, to wit, the sum of Five Thousand ($5,000.00) Dollars, and had and has a rental value of, to wit, the sum of Fifty ($50.00) Dollars per month, and has been actually rented at ($50.00) Dollars per month ever since the filing of the voluntary petition in bankruptcy by the bankrupt; that subsequently to his adjudication in bankruptcy the said bankrupt caused his wife, the said Jessie M. Shute, to file a declaration of homestead upon said premises, and

himself had the same recorded in the office of the County Recorder of Gila County on the 18th day of June, 1928, thereby clouding the title of your trustee and carrying out the disclaimer and relinquishment of his right and title to the real estate and improvements as hereinbefore set forth, in favor of his wife, the said Jessie M. Shute, all of which was done with the intent to hinder, delay and defraud his creditors.

FIFTEENTH: For the reason that he has at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy transferred personal property owned by himself to one A. E. England, with intent to hinder, delay, and defraud his creditors; that said property consisted of one automobile of the value of, to wit, Nine Hundred ($900.00) Dollars, and more particularly described as follows, to wit: 1928 Hudson Sedan, Motor #495579, Serial #799342; that said transfer [85] was accomplished by delivering the said automobile to the said A. E. England to hold and keep as his own, and to store the same in the building occupied by the A. E. England Motors in the City of Phoenix, County of Maricopa, State of Arizona; that said transfer was made in the early part of the year, 1928, and was made in contemplation of bankruptcy; that the said automobile remained in the custody of the said A. E. England up to and subsequent to the adjudication in bankruptcy of the bankrupt in the above-entitled matter until a time some weeks subsequent to said adjudication when the same was

purchased from your trustee by the said bankrupt for the sum of Nine Hundred ($900.00) Dollars.

SIXTEENTH: For the reason that he has at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy concealed and permitted to be concealed personal property belonging to said bankrupt and bankrupt estate, more particularly described as follows: A savings account numbered 19061, in the First National Bank of Arizona, standing in the name of Jessie M. Shute, but being the community property of said bankrupt, and said Jessie M. Shute, and consisting of funds acquired after marriage by the said bankrupt, of the sum of Eleven Hundred Sixty-two and 30/100 ($1162.30) Dollars; $1,000 or more of which sum was by the said bankrupt withdrawn or permitted to be withdrawn from the said account after the same had been the subject of testimony and examination at a meeting of creditors of the said bankrupt held on the 29th day of May, 1928, for the purpose of placing the same beyond the reach of the trustee and of the Court of Bankruptcy, and which sum has been secreted and concealed from the trustee and the officers of the Court of Bankruptcy, and thereby depriving the estate of said bankrupt of said sum of One Thousand ($1,000.00) Dollars, with intent to hinder, delay and defraud the creditors of said bankrupt. [86]

SEVENTEENTH: For the reason that he has at a time subsequent to the first day of the twelve months immediately preceding the filing of his peti-

tion in bankruptcy concealed and permitted to be concealed personal property belonging to said bankrupt and bankrupt estate, more particularly described as follows: By receiving and secreting in, to wit, the month of June, 1928, the sum of, to wit, Eight Thousand ($8,000.00) Dollars, paid to said bankrupt by one Wesley Goswick, upon a contract entered into by said Goswick and said bankrupt prior to the filing of the petition in bankruptcy by the bankrupt herein, which said contract passed by operation of law to your trustee in bankruptcy in these proceedings at the time they were instituted, and which sum of, to wit, Eight Thousand ($8,000.00) Dollars was the property of your trustee in bankruptcy and collected by the said bankrupt without the knowledge or consent of the trustee and he has ever since said time concealed the same from the trustee and the officers of the Bankruptcy Court with intent to hinder, delay and defraud the creditors of said bankrupt.

EIGHTEENTH: For the reason that he has in the course of the proceedings in bankruptcy refused to obey a lawful order of the Court, to wit, the order of said bankrupt court made on the 1st day of May, 1928, requiring said bankrupt to file new schedules or to amend said schedules theretofore filed by him to conform to the facts and the provisions of the Bankruptcy Act; that said bankrupt subsequent to said order filed what was termed an amended schedule, but that said amended schedule did not comply with said order of the Court dated May 1, 1928, as aforesaid, and did not con-

form to the facts and the provisions of the Bankruptcy Act, in that said bankrupt knowingly and fraudulently omitted from said amended schedule the following assets belonging to said [87] bankrupt estate, to wit:

(1) One Hudson car described as 1928 Hudson Sedan, Motor #495579, Serial #799342, of the value of $900.00.

(2) One life insurance policy upon the life of the bankrupt as follows. Policy #3310053, issued by the Mutual Life Insurance Company of New York, dated May 25th, 1924, of the cash surrender value of $746.85.

(3) Savings account in the First National Bank of Arizona at Phoenix, Arizona, being account #19061, in the name of Jessie M. Shute, wife of said bankrupt, against which account said bankrupt retained the right to check, said savings account containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1162.30.

(4) One phonograph of the value of $200.00.

(5) The sum of $250.00, deposited by the bankrupt with one Arthur LaPrade during the month of December, 1927.

(6) One Essex car described as Essex Coach, Serial #640003, of the value of $600.00.

(7) The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45,

East Globe Townsite, and being of the value of, to wit, $5,000.00.

(8) One certain contract entered into by and between one Wesley Goswick and the bankrupt, on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of $20,000 out of the proceeds of the sale by the said Wesley Goswick of a cinnabar mining property consisting of twenty unpatented mining claims located upon or near what is known as Slate Creek in the County of Gila, State [88] of Arizona, the title to said property being in the name of said Goswick, and the sale thereof being made to one L. E. Foster, for the sum of $200,000, payable as follows: $5,000 on the 8th day of December, 1926; $10,000 on or before six months from the 8th day of December, 1926; $20,000 on or before one year from the 8th day of December, 1926; $82,500 on or before 18 months from the 8th day of December, 1926, and $82,500 on or before two years from the 8th day of December, 1926, less certain sums to be paid monthly by the purchaser of said property and less certain royalties which were to be paid by the purchaser as they were received on the smelting returns of the ore taken from said mine, a copy of which said contract between said Goswick and said Foster being held in escrow in the Old Dominion Bank of Globe, Arizona; the said mining property having been owned jointly by the said Wesley

Goswick and one William A. Packard, with the exception of such interest as the said bankrupt had therein, which interest of the bankrupt under said contract amounted to the said sum of $20,000, and was payable in an amount of 10% of the payments made by the purchaser at the time they were made by the purchaser; the amount of $16,500 being due on said contract to said bankrupt on the date of the filing of the petition in bankruptcy herein.

NINETEENTH: For the reason that he has failed to explain satisfactorily losses of assets and deficiency of assets to meet his liability in this, that for the period commencing January 1st, 1927, and up to and including the date of the filing of his petition in bankruptcy herein by said bankrupt, to wit, the 17th day of April, 1928, said bankrupt had cash assets in the form [89] of income and other amounts received by him during said period of an amount of not less than $21,695.20; and that after deducting from said amount all expenditures and disbursements thereof testified to by said bankrupt under examination before the referee in bankruptcy at the first meeting of creditors, or revealed from such statements and data as have been produced by said bankrupt in said bankruptcy proceedings, there still remains an amount of not less than Seven Thousand ($7,000.00) Dollars received by said bankrupt during said period of time, which is totally unaccounted for and the disappearance of which said bankrupt has failed to explain satisfactorily or at all; and said bankrupt has testified under oath at

his examination before the referee in bankruptcy, at the first meeting of creditors in said bankruptcy proceedings, that he cannot explain such deficiency.

WHEREFORE, objection is made to the granting of such application for a discharge.

J. J. MACKAY,
Objecting Creditor.
ALICE M. BIRDSALL,
Attorney for Creditor. [90]

United States of America,
District of Arizona,—ss.

J. J. Mackay, being the creditor above named, does hereby make solemn oath that the statements contained in the foregoing specifications of objection to discharge of bankrupt, subscribed by him, are true.

J. J. MACKAY.

Subscribed and sworn to before me this 15th day of December, 1928.

[Notarial Seal] BESS M. WHITE,
Notary Public.

My commission expires June 18, 1931.

[Endorsed]: Filed Dec. 19, 1928. [91]

In the District Court of the United States, in and for the District of Arizona.

March, 1928, Term—Friday, July 20, 1928—at Prescott.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

MINUTES OF COURT—JULY 20, 1928—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 15, 1928, TO FILE SPECIFICATIONS IN OPPOSITION TO DISCHARGE OF BANKRUPT.

On motion of Thomas W. Nealon, trustee, and Alice M. Birdsall, appearing for creditor, J. J. Mackay,—

IT IS ORDERED BY THE COURT that the time of the trustee and of the creditor J. J. Mackay be, and is hereby, extended to October 15, 1928, in which to file their specifications in opposition to the discharge of the bankrupt. [92]

In the District Court of the United States, in and for the District of Arizona.

April, 1928, Term—Tuesday, September 25, 1928—at Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 25, 1928—ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 1, 1928, TO FILE SPECIFICATIONS IN OPPOSITION TO DISCHARGE OF BANKRUPT.

IT IS ORDERED BY THE COURT that time of the trustee and creditors in the above-entitled cause to file specifications in opposition to discharge is extended to November 1st, 1928. [93]

In the District Court of the United States, in and for the District of Arizona.

October, 1928, Term—Saturday, October 27, 1928—at Phoenix.

Honorable F. C. JACOBS, United States District Judge, in Chambers.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 27, 1928—ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 15, 1928, TO FILE SPECIFICATIONS AND OBJECTIONS TO DISCHARGE OF BANKRUPT.

On motion of Alice Birdsall, Esq.,—

IT IS ORDERED BY THE COURT that time of the trustee and creditors to file specifications and objections to discharge of the bankrupt is extended to December 15th, 1928. [94]

In the District Court of the United States in and for the District of Arizona.

October, 1928, Term—Friday, December 14, 1928—at Phoenix.

Honorable F. C. JACOBS, United States District Judge, in Chambers.

[Title of Cause.]

MINUTES OF COURT—DECEMBER 14, 1928—ORDER EXTENDING TIME TO FILE SPECIFICATIONS AND OBJECTIONS TO DISCHARGE OF BANKRUPT.

IT IS ORDERED BY THE COURT that the time for trustee and creditors to file specifications and objections to discharge of bankrupt be extended

ten (10) days from and after December 14th, 1928. [95]

In the District Court of the United States, in and for the District of Arizona.

October, 1928, Term—Wednesday, January 2, 1929—at Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

MINUTES OF COURT—JANUARY 2, 1929—ANNOUNCEMENT OF DISQUALIFICATION OF HONORABLE F. C. JACOBS, JUDGE.

Honorable F. C. Jacobs, Judge, announces his disqualification to hear this matter, and called to his assistance the Honorable William H. Sawtelle, Judge of the Tucson Division of this court. [96]

Wednesday, January 2, 1929.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

MINUTES OF COURT—JANUARY 2, 1929—HEARING.

Trustee's and creditors' specifications of objection to discharge of bankrupt, come on regularly for hearing this date.

The bankrupt, George W. Shute, is present in person with his counsel, Orme Lewis, Esq., and James R. Moore, Esq. Thomas W. Nealon, trustee, is present. Alice M. Birdsall appears as counsel for the creditor, J. J. Mackay.

It is stipulated by and between the respective counsel and the trustee herein, that the depositions heretofore taken and the testimony taken by the stenographer before the referee may be used. It is further stipulated that bankrupt's income tax reports for 1925 and 1926 will be furnished.

And, thereupon, the further trial of this matter is ORDERED continued to January 3d, 1929, at ten o'clock A. M.

Thursday, January 3, 1929.

MINUTES OF COURT—JANUARY 3, 1929—ORDER CONTINUING HEARING TO JANUARY 9, 1929.

The bankrupt, George W. Shute, is present in person, with his counsel, Orme Lewis, Esq., and James R. Moore, Esq. Thomas W. Nealon, trustee, is present. Alice M. Birdsall appears as counsel for the creditor, J. J. Mackay.

Further hearing is now had by the Court on objections to the discharge of the bankrupt, George W. Shute, of the trustee, Thomas W. Nealon, and the creditor, J. J. Mackay.

The following stipulations are now made and entered into by respective counsel:

That all depositions and testimony heretofore introduced in evidence before the referee may be admitted in so far as pertinent.

That the testimony of the witness, Mrs. Mary Holmes, taken before the referee, may be received in evidence as the original.

That the copy of the income tax returns for the year 1926 of both the bankrupt and his wife, Mrs. George W. Shute, may be received as originals.

That the copy of income tax returns of the bankrupt for the year 1925 may be received as the original. [97]

That the Court may have the transcript of testimony taken before the referee for review before hearing.

And, thereupon, the further hearing of this matter is ORDERED continued until Wednesday, January 9th, 1929.

Friday, January 4, 1929.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—JANUARY 4, 1929—ORDER RE TRANSMISSION OF TRANSCRIPT OF TESTIMONY.

IT IS ORDERED BY THE COURT that R. W. Smith, referee in bankruptcy, deliver to the Clerk of this court, for transmission to the Honorable William H. Sawtelle, Tucson, Arizona, the tran-

script of the testimony taken before the said referee, together with the exhibits attached thereto or in the files of the said referee, in connection with said transcript.

Wednesday, January 9, 1929.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

MINUTES OF COURT—JANUARY 9, 1929—HEARING (RESUMED).

The objections of the trustee, and the creditor, J. J. Mackay, to discharge of bankrupt herein, come on regularly for hearing this date. The following are present:

George W. Shute, with his counsel, Orme Lewis, Esq., and James R. Moore, Esq.

Thomas W. Nealon, trustee.

J. J. Mackay, creditor, with his counsel, Alice M. Birdsall.

On motion of Alice M. Birdsall, counsel for the creditor, J. J. Mackay,—

IT IS ORDERED that John L. Dyer, Esq., be associated with counsel for the creditor, J. J. Mackay.

D. A. Little is now duly sworn as court reporter to report the evidence in this case for the trustee and creditor, J. J. Mackay.

The following exhibits are admitted in evidence and filed on behalf of the trustee and objecting creditor:

Exhibit No. 1. Creditor's claim of J. J. Mackay.

Exhibit No. 2. Schedules filed by bankrupt.

Exhibit No. 3. Amended schedules filed by bankrupt. [98]

The witness, Otis E. Rogers, is sworn and examined on behalf of the trustee and objecting creditor.

The following exhibits are admitted in evidence and filed on behalf of the trustee and objecting creditor:

Exhibit No. 4. Conditional sales contract.

Exhibit No. 5. Chattel mortgage.

Exhibit No. 6. Check No. 528, signed by G. W. Shute.

The witness, E. A. Wedophol, is sworn and examined on behalf of the trustee and objecting creditor.

Exhibit No. 7. Letter on letter-head of Dr. Charles S. Vivian, is admitted in evidence and filed on behalf of the trustee and objecting creditor.

The witness, Sylvan C. Gans, is sworn and examined on behalf of the trustee and objecting creditor.

Exhibit No. 8. Five checks, dated June 24th, 1927, August 22d, 1927, September 2d, 1927, November 17th, 1927, and January 4th, 1928, respectively, and all signed by G. W. Shute, is admitted in evidence and filed on behalf of the trustee and objecting creditor.

The witness, George F. Wilson, is sworn and examined on behalf of the trustee and objecting creditor.

Exhibit No. 9. Letter signed Armstrong, Lewis & Cramer, by G. W. Shute, dated November 26th, 1928, addressed to Old Dominion Bank, Globe, Arizona, to which is attached a carbon copy of modification of contract.

Stipulation is entered into by and between respective counsel herein whereby the above Exhibit No. 9 may be returned to the Old Dominion Bank, Globe, Arizona. Whereupon,

IT IS ORDERED that a certified copy of said letter be substituted in this case. [99]

The following exhibits are admitted in evidence and filed on behalf of the trustee and objecting creditor:

Exhibit No. 10. Warranty deed, Albert G. Sanders and Mary E. Sanders, his wife, to Jessie M. Shute, dated December 20th, 1920.

Exhibit No. 11. Realty mortgage, G. W. Shute and Jessie M. Shute, his wife, to Mary E. Holmes, guardian, dated January 17th, 1921.

Exhibit No. 12. Declaration of Homestead by Jessie M. Shute.

Exhibit No. 13. Certified copy of order of adjudication and reference filed and recorded in the office of the county recorder, Gila County, Arizona.

The witness, W. W. McBride, is sworn and examined on behalf of the trustee and objecting creditor.

And thereupon, IT IS ORDERED that court do stand at recess until two o'clock P. M. this date.

Subsequently, the parties hereto and their respective counsel being present pursuant to recess, further proceedings are had as follows:

The witness, W. W. McBride, heretofore sworn and examined on behalf of the trustee and objecting creditor, now resumes the witness-stand.

The following exhibits are admitted in evidence and filed on behalf of the trustee and objecting creditor:

Exhibit No. 15. Receipt for insurance policy.

Exhibit No. 16. Copy of memorandum made by George W. Shute.

Exhibit No. 17. Copy of income tax return for 1925.

Exhibit No. 18. Copy of income tax return for 1926.

Exhibit No. 19. Check No. 548, dated December third, 1927.

Exhibit No. 20. Check No. 545, dated December 19th, 1927.

Exhibit No. 21. Copy of articles of copartnership.

Exhibit No. 22. Modification of partnership agreement, dated December 27, 1923.

Exhibit No. 23. Modification of partnership agreement, dated December 17, 1924.

Exhibit No. 24. Dividend report of Armstrong, Lewis & Cramer, to G. W. Shute. [100]

Exhibit No. 25. Copy of note for $1200.00 dated October 18, 1927, signed by Joseph E. Noble.

Exhibit No. 26. Copy of note for $1500.00, dated April 14, 1928, signed by Leslie H. Creed and Virginia S. Creed.

Whereupon, the trustee and objecting creditor rest.

BANKRUPT'S CASE.

The following witnesses are sworn and examined on behalf of the bankrupt:

Wesley Goswick.
Louis E. Foster.

Whereupon the further hearing of this case is continued to January 10th, 1929, at nine-thirty o'clock A. M., to which time the parties and counsel are excused.

Thursday, January 10, 1929.

MINUTES OF COURT—JANUARY 10, 1929—HEARING (RESUMED).

The parties, and their respective counsel, are present pursuant to recess, and further proceedings are had as follows:

BANKRUPT'S CASE—CONTINUED.

The following witnesses are sworn and examined on behalf of the bankrupt:

Gladys Parry,
Arthur T. LaPrade,
Joseph E. Noble,
Orme Lewis.

Exhibit "A" is admitted in evidence and filed on

behalf of the bankrupt, statement of receipts and disbursements, prepared by Orme Lewis.

Thomas W. Nealon, trustee herein, is sworn and examined on behalf of the bankrupt.

And, thereupon, IT IS ORDERED that court do stand at recess until two o'clock P. M. this date. [101]

Subsequently, the parties hereto and their respective counsel being present pursuant to recess, further proceedings are had as follows:

The witness, Thomas W. Nealon, heretofore sworn and examined on behalf of the bankrupt, now resumes the witness-stand.

The bankrupt, George W. Shute, is sworn and examined on his own behalf.

And, thereupon, the further hearing of this matter is ORDERED continued to January 11th, 1929, at nine-thirty o'clock A. M., to which time the parties and counsel are excused.

Friday, January 11, 1929.

MINUTES OF COURT—JANUARY 11, 1929—HEARING (RESUMED).

All the parties and their respective counsel are present pursuant to recess, and further proceedings are had as follows:

BANKRUPT'S CASE—CONTINUED.

The examination of the bankrupt, George W. Shute, heretofore sworn and examined, is resumed.

And, thereupon, IT IS ORDERED that court do stand at recess until one o'clock P. M. this date.

Subsequently, the parties hereto and their respective counsel being present pursuant to recess, further proceedings are had as follows:

The examination of the bankrupt, George W. Shute, heretofore sworn and examined, is resumed.

The following exhibits are admitted in evidence and filed on behalf of the trustee and objecting creditor:

Exhibit No. 27. Quitclaim deed, from Mrs. M. B. Cullumber to G. W. Shute, dated October 18, 1909.

Exhibit No. 28. Warranty deed, from Mrs. Mary B. Cullumber to G. W. Shute, dated October 18, 1909.

Exhibit No. 29. Complaint and answer in case No. 5431, in the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the county of Yavapai, William Stephens, as the Administrator of the Estate of Mary B. Cullumber, Deceased, vs. G. W. Shute. [102]

Exhibit No. 30. Warranty deed, from G. W. Shute, Ada Ray Gillespie, Jessie M. Shute and Arthur Small, to John H. Robinson, dated October 4, 1916.

Exhibit No. 31. Box containing three packages check stubs; six packages checks; six ledger sheets; twenty-seven bank statements.

And the bankrupt rests.

The witness, W. W. McBride, heretofore sworn

and examined is now called in rebuttal on behalf of the trustee and objecting creditor.

And, thereupon, the further hearing of this matter is ORDERED continued to January 12th, 1929, at eight-thirty o'clock A. M., to which time the parties and counsel are excused. [103]

In the District Court of the United States, in and for the District of Arizona.

October, 1928, Term—Saturday, January 12, 1929 —at Phoenix.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

[Title of Cause.]

MINUTES OF COURT—JANUARY 12, 1929—HEARING (RESUMED).

All the parties and their respective counsel are present pursuant to recess, and further proceedings are had as follows:

All the evidence being in, the case is argued by respective counsel to the Court.

And, thereupon, the case is submitted to the Court for decision. Whereupon, the Court finds that none of the specifications has been sustained by the evidence, and it is now, therefore,

ORDERED, ADJUDGED AND DECREED by the Court that the objections to the discharge of the bankrupt be and they are hereby overruled,

and that the petition for discharge of the bankrupt, be, and it is hereby granted, to which finding and ruling of the Court, the trustee and creditor, J. J. MacKay, and each of them, except, and now give notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit. Whereupon, the trustee and the creditor, J. J. MacKay, and each of them, now request that they be allowed sixth (60) days in which to prepare and file their bill of exceptions. Whereupon,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the trustee, Thomas W. Nealon, and the creditor, J. J. MacKay, and each of them, be and they are hereby granted the period of sixty (60) days in which to prepare and file their bill of exceptions herein. [104]

December, 1928, Term—Wednesday, January 16, 1929—at Globe.

MINUTES OF COURT—JANUARY 16, 1929—ORDER FIXING AMOUNT OF BOND FOR COSTS.

IT IS ORDERED BY THE COURT that the bond for costs on appeal in this matter, be, and it is hereby fixed in the sum of Two Hundred Fifty Dollars ($250.00), same to be approved by the Clerk of this court or his deputies at Phoenix, Arizona.

November, 1928, Term—Thursday, February 28, 1929—at Tucson.

MINUTES OF COURT—FEBRUARY 28, 1929—ORDER GRANTING APPLICATION FOR EXTENSION OF TIME TO PREPARE RECORD AND STATEMENT OF EVIDENCE.

Thomas W. Nealon, Esq., and Alice M. Birdsall appear as counsel for the trustee and objecting creditor. Orme Lewis, Esq., appears as counsel for George W. Shute, the bankrupt.

The application for extension of time to prepare the record and statement of evidence herein, and for filing record on appeal and docketing record in the United States Circuit Court of Appeals for the Ninth Circuit, comes on regularly for hearing this date upon due notice.

The bankrupt objects to said application, and same is argued by respective counsel. Whereupon,

IT IS ORDERED BY THE COURT that said objection be overruled, and the application be, and it is hereby, granted.

Subsequently, counsel for the bankrupt withdraws his objection to said application.

April, 1929, Term—Friday, May 3, 1929—at Phoenix.

MINUTES OF COURT—MAY 3, 1929—ORDER EXTENDING TIME TO AND INCLUDING JUNE 15, 1929, FOR REVISION AND PROPOSAL OF STATEMENT OF EVIDENCE, ETC.

James R. Moore, Esq., and Orme Lewis, Esq., appear as counsel for the bankrupt. Thomas W. Nealon, Esq., and Alice M. Birdsall, appear as counsel for the trustee and objecting creditor.

The matter of settlement and approval of the statement of evidence on appeal comes on regularly for hearing this date, and is now duly argued to the Court by respective counsel. Whereupon, [105]

IT IS ORDERED BY THE COURT that the trustee and objecting creditor be allowed until June 15th, 1929, in which to revise and file their proposed statement of evidence, and

IT IS FURTHER ORDERED that said trustee or objecting creditor may withdraw from the Clerk's files for the said purpose the proposed statement of evidence which was lodged with the Clerk of this court on April 16th, 1929.

May, 1929, Term—Tuesday, August 27, 1929—at Tucson.

MINUTES OF COURT—AUGUST 27, 1929—ORDER ALLOWING SUBSTITUTION OF COPY FOR ORIGINAL BANKRUPT'S PROPOSED AMENDMENTS TO AMENDMENT TO STATEMENT OF EVIDENCE, ETC.

IT IS ORDERED that copy of bankrupt's proposed amendments to amendment to statement of evidence, submitted by attorneys for bankrupt, be, and the same is hereby, substituted for and filed as of date of filing of the original which has been lost or misplaced.

Saturday, August 31, 1929.

MINUTES OF COURT—AUGUST 31, 1929—ORDER ALLOWING WITHDRAWAL OF EXTRA COPIES OF STATEMENT OF EVIDENCE, ETC.

IT IS ORDERED that appellants herein be and they are hereby allowed to withdraw extra copies of the original statement of the evidence for the purpose of permitting appellants to recompile same. [106]

[Title of Court and Cause.]

DISCHARGE OF BANKRUPT.

WHEREAS, George W. Shute, of Phoenix, in said District, has been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf.

It is, therefore, ordered by the Court that said George W. Shute be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 17th day of April, A. D. 1928, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, and the seal thereof, this 12th day of January, A. D. 1929.

[Seal of the Court] C. R. McFALL,
Clerk.
By H. F. Schlittler,
Deputy Clerk.

Filed Jan. 12, 1929. [107]

In the United States District Court, in and for the District of Arizona.

IN BANKRUPTCY—No. B.–486—PHOENIX.

In the Matter of GEORGE W. SHUTE, Bankrupt.

In the Matter of Bankrupt's Petition for Discharge.

FINDINGS, JUDGMENT AND ORDER.

In this proceeding we are not called upon to determine whether the trustee can recover or subject the property in question to the payment of debts or whether it was or was not community or separate property. Those questions can be determined in the usual and due course of judicial proceedings. The specifications filed by the creditor and by the trustee at the meeting of the creditors charge or allege that the bankrupt has knowingly and fraudulently concealed from his trustee certain property mentioned and described in the specifications and with having knowingly and fraudulently made a false oath and rendered a false account in relation to the bankruptcy proceedings; that he has failed to keep books of account or records from which his financial condition and business transactions may be ascertained and has concealed records from which his business transactions might be revealed; that he has transferred real property with intent to hinder and defraud his creditors; that he failed to obey a lawful order of the referee and include in an amended schedule certain property, including

the property in dispute. To some extent, at least, this latter objection involved the interpretation and construction of the Community Property Law of Arizona and that, of course, should [108] be determined in due course. In reviewing the evidence and I cannot go into detail in announcing my conclusion, I think it is true that Judge Shute was required to incorporate in his voluntary petition the insurance policy. I think he realizes now that that was his duty but, in view of all the facts and his offer at the first meeting of creditors and the fact that he called the attention of the trustee to the fact that he had an insurance policy, which, of course, he must have anticipated would be demanded for inspection, I do not find that that was fraudulent or that he fraudulently or corruptly failed to include it in his schedule. I do not find that there is any substantial difference between Judge Shute's testimony and that of Mr. McBride. Without reviewing the testimony in its entirety, I find that none of the specifications have been sustained; that there has been no fraud committed by the bankrupt and that he is not guilty of false swearing or of any act which would bar his discharge. I believe Judge Shute's testimony. I do not believe that he has intentionally and knowingly committed any criminal act punishable under the Bankruptcy Law or under any other law. I think the evidence shows he was a very poor business man—kept his records in a very loose manner, as many people do, unfortunately, but when you take into consideration the fact that he, in answering

the questions with reference to his income from Armstrong, Lewis & Kramer, made a statement to the best of his recollection, as I gather from his testimony, but said, "I prefer that matter be ascertained," or words to that effect, "from the records of Armstrong, Lewis & Kramer." That, to my mind, does not show any effort to conceal anything or to commit any fraud. The evidence has taken a wide range and some of it goes back and involves transactions of fifteen or twenty years ago. It is a matter of common knowledge that none of us can remember the details of transactions over such a long period of time. If there are those who are fortunate enough to remember those things in every [109] detail, they are unusually gifted in that respect and the exception to the general run of mankind. Therefore, the objections will be overruled and an order will be entered granting the discharge.

Done in open court this 26th day of April, 1929.

WM. H. SAWTELLE,
District Judge.

Filed in the office of the Clerk of the United States District Court in and for the District of Arizona, this 26th day of April, 1929.

C. R. McFALL,
Clerk. [110]

[Title of Court and Cause.]

ORDER ENLARGING APPELLANTS' TIME FOR PREPARATION OF RECORD AND FILING OF PRAECIPE, ALSO TIME OF APPELLEE.

Application for enlargement of time for preparation of record including preparation and settlement of statement of evidence and filing of the praecipe by the appellants coming on duly for hearing, and good cause appearing therefor, said enlargement is hereby granted, and time for preparation and settlement of statement of evidence and for filing the record and the praecipe indicating the portions of the record to be incorporated into the transcript of the record on appeal by appellants is hereby extended for a period of 60 days from and after the date of this order, and the time of the appellees for the filing of their praecipe is also extended for a period of 30 days thereafter.

Done in open court this 28 day of February, 1929.

WM. H. SAWTELLE,
Judge United States District Court.

[Endorsed]: Filed Feb. 28, 1929. [112]

[Title of Court and Cause.]

NOTICE OF LODGING STATEMENT OF EVIDENCE AND PRAECIPE.

To George W. Shute, Bankrupt, Above Named, and/or Messrs. James R. Moore and Orme Lewis, His Attorneys:

You and each of you will please take notice that Thomas W. Nealon, trustee of the above-named bankrupt and estate, and J. J. Mackay, objecting creditor, in the matter of bankrupt's petition for discharge, appellants herein, have prepared the statement of the evidence taken at the hearing of the petition of the bankrupt for discharge, having prepared said statement of the evidence for the purposes of appeal, and have on this 16th day of April, 1929, lodged said statement of the evidence in the office of the Clerk of the above-entitled court for your examination. Said trustee and objecting creditor, the appellants here, have at the same time filed with the said Clerk a praecipe, of which a copy is herewith served upon you, indicating the portion of the record that they deem necessary to be incorporated into the transcript on appeal.

You are furthermore notified that said trustee and objecting creditor, the appellants herein, will on Monday, the 29th day of April, 1929, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court in Tucson, Arizona, before the Honorable

William H. Sawtelle, Judge of said court, ask the Court to approve the [113] said statement of the evidence lodged with the Clerk on this date.

THOMAS W. NEALON,
Trustee and Appellant.
JOHN L. DYER,
ALICE M. BIRDSALL,
Attorneys for Objecting Creditor and Appellant.

Received copy of the above notice and of the statement of evidence this 16th day of April, 1929.

JAMES R. MOORE,
ORME LEWIS,
Attorneys for Bankrupt and Appellee.

[Endorsed]: Filed Apr. 16, 1929. [114]

[Title of Court and Cause.]

APPLICATION FOR ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBIT.

Come now Thomas W. Nealon, trustee in bankruptcy in the above-entitled matter, and J. J. Mackay, objecting creditor, by his attorney, Alice M. Birdsall, and make this application to the Court for an order directing the transmittal of original Trustee's and Objecting Creditor's Exhibit No. 31, introduced in evidence at the hearing on bankrupt's petition for discharge in its original form with the transcript of record to the United States Circuit Court of Appeals for the Ninth Circuit without the necessity of making copies thereof.

This application is made for the reason that the said exhibit consisting of a large number of checks and check stubs, together with various endorsements and notations thereon, is incapable of being copied, and should be transmitted to the Appellate Court in its original form for examination by such Court.

WHEREFORE, these applicants pray that an order be made by this Honorable Court authorizing and directing the transmittal of said exhibit in its original form with the transcript of record to the United States Circuit Court of Appeals for the Ninth Circuit, without the necessity of making copies thereof. [115]

(Signed) THOMAS W. NEALON,
Trustee and Appellant.
(Signed) JOHN L. DYER,
(Signed) ALICE M. BIRDSALL,
Attorneys for Objecting Creditor and Appellant.

[Endorsed]: Filed Apr. 16, 1929. [116]

[Title of Court and Cause.]

ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBIT.

This matter coming on regularly to be heard this —— day of ————, 1929, and it appearing to the satisfaction of the Court that Trustee's and Objecting Creditor's Exhibit No. 31 filed in the above-entitled case at the trial thereof is incapable of being copied, and that it should be transmitted to

the Appellate Court in its original form for examination by such Court,—

NOW, THEREFORE, IT IS HEREBY ORDERED, that Trustee's and Objecting Creditor's Exhibit No. 31 may be transmitted in its original form with the transcript of record to the United States Circuit Court of Appeals for the Ninth Circuit, without the necessity of making copies thereof.

Done in open court this —— day of ————, 1929.

————————————,
United States District Judge. [117]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE.

BE IT REMEMBERED that the hearing in the above-entitled cause came on regularly to be heard before the Honorable William H. Sawtelle, United States District Judge for the District of Arizona, in the City of Phoenix, State and District of Arizona, on the 9th day of January, 1929, at the hour of 10:00 o'clock A. M.

APPEARANCES:

Miss ALICE BIRDSALL, for Creditor.
JOHN L. DYER, Esq., for Creditor.
THOMAS W. NEALON, Trustee.
Messrs. MOORE & THOMPSON, for Bankrupt.
ORME LEWIS, Esq., for Bankrupt.

THEREUPON, the following proceedings were had:

D. A. Little was sworn as Reporter.

Miss BIRDSALL.—I move that Mr. Dyer be associated as counsel for Mr. J. J. Mackay.

The COURT.—The order associating Mr. Dyer may be entered.

Mr. NEALON.—It seems that one witness, Mr. England, has been subpoenaed but is in the hospital. We are willing to stipulate as to that that his testimony taken before the referee may be used in this case.

Mr. MOORE.—There was some additional testimony that we want from Mr. England that was not offered at that time. For the Court's information, I will state that I have only recently come into the case after objections to the discharge were filed.

The COURT.—Well, in the event he is not present, do you so stipulate?

Mr. MOORE.—Yes, I do.

The COURT.—You may proceed.

Mr. NEALON.—We think perhaps we can shorten the time a [118] great deal if counsel will stipulate as to certain matters that will be of—

The COURT.—You may make your offer and see if it is satisfactory to counsel.

Mr. NEALON.—Will you stipulate that Mrs. Conger is a notary public, with authority to administer oaths and that Judge Shute signed and swore to the different schedules filed in this matter before her?

Mr. MOORE.—Yes.

Mr. NEALON.—That this matter was referred to the referee, R. W. Smith, of this court?

Mr. MOORE.—Yes.

Mr. NEALON.—That the referee had the power to administer oaths? I don't know if that is necessary.

Mr. MOORE.—Yes, I will concede that.

Mr. NEALON.—That the deposition of Mrs. Mary E. Holmes, together with the exhibits attached, may be introduced, the exhibits to have the force as if they were original letters?

Mr. MOORE.—Yes.

Mr. NEALON.—That Mrs. Shute's testimony taken before the referee may be admitted with full force and effect as if taken in this court?

Mr. MOORE.—I stipulate that with the reservation we have the privilege of calling Mrs. Shute, if we do desire.

Mr. NEALON.—Yes. We, of course, would like that same privilege.

DEPOSITION OF MARY E. HOLMES, FOR TRUSTEE.

Testimony of MARY E. HOLMES, taken on order of Thomas W. Nealon, Trustee, before Charles C. Cabot, Esq., referee in bankruptcy for the County of Suffolk, Commonwealth of Massachusetts, sitting as Special Commissioner, at 111 Devonshire Street, Boston, [119] Massachusetts, on Wednesday, September 19, 1928, at 10 o'clock A. M.

(Deposition of Mary E. Holmes.)

APPEARANCES:

For THOMAS W. NEALON, Trustee, MARION WESTON COTTLE, Esq.

For J. J. MACKAY, a Creditor of the Estate, ALICE M. BIRDSALL, Esq.

For MARY E. HOLMES, the Witness, J. HARVEY WHITE, Esq.

Mrs. MARY E. HOLMES, being first duly sworn, testified as follows:

(Examination by Miss COTTLE.)

My name is Mary E. Holmes. I reside at 40 Algonquin Road, Chestnut Hill, Massachusetts. I am the Mary E. Holmes to whom as guardian of the person and estate of Helen H. McKillop, incompetent, George W. Shute and Jessie M. Shute, his wife, executed a mortgage dated January 17, 1921, covering lots 1, 2, 3, 4, 5 and 6, Block 45, E. Globe, Townsite, Gila County, Arizona, to secure the payment of a certain promissory note for the sum of $3,500, executed by the same parties, dated January 17, 1921, due three years after date, bearing 10 per cent interest per annum, said mortgage being recorded in the office of the County Recorder of Gila County, Arizona, in Book 17 of Mortgages at page 69. I have not the original mortgage. It is in Globe, Arizona; always has been. It is in the possession of Graham Foster, my attorney, or the attorney for the estate. His address is simply Globe, Arizona. I have not a copy of this mort-

(Deposition of Mary E. Holmes.)

gage. My attorney, Mr. White, has not a copy. There is not any copy of this mortgage in the east, so far as I know. I never have had a copy of this mortgage. The amount of the mortgage as stated is correct. The amount of interest is correct—10 per cent per annum. I have not the original mortgage note. Graham Foster has it. The amount of this note is $3500. I have the record payments [120] on the mortgage note in my cash account.

(Whereupon witness produces memorandum representing payments of both interest and principal from Judge Shute.)

This item at the bottom (indicating), dated September 17, 1928, the amount being $3,000, is principal. The payments to me of interest on this mortgage were made by checks from Mr. Shute. I never received any money from the tenant of this property directly. The items of $50.00 shown on memorandum represent the payments that he made that year, made by check from Mr. Shute. Some were his personal checks; some were checks that he made over to me, by endorsing them, sending the check to me. I do not know where those checks came from to him.

(The memorandum as evidence of payments of interest and principal in connection with the Shute mortgage was thereupon introduced in evidence and incorporated in the record. The same follows:)

Shute Note $3500.00.

Date Jan. 17, 1921, at 10 per cent Interest.

1921.			
Apr. 25.	Sent 18th	$87.50	
1921.			
Aug. 2.	Sent July 17	87.50	
Oct. 24.	Sent 17th	87.50	262.50
1922.			
Jan. 17.		87.50	
June 2.	Sent May 22	87.50	175.00
1923.	None		
1924.			
Jan. 17.		50.00	
Feb. 4.		50.00	
Apr. 11.	Sent Apr. 4	50.00	
May 10.		50.00	200.00
[121]			
1925.			
Apr. 27.	Sent Apr. 9	50.00	
May 26.		137.00	
June 5.		50.00	
July 18.		50.00	
Aug. 28.	Sent Aug. 17	50.00	
Sept. 17.		50.00	
Oct. 21.		50.00	
Nov. 20.		50.00	
Dec. 21.		50.00	537.00
1926.			
Jan. 20.		50.00	
Feb. 18.		50.00	

(Deposition of Mary E. Holmes.)

Mar. 22.	50.00	
Apr. 19.	50.00	
May 20.	50.00	
June 17.	50.00	
July 17.	50.00	
Aug. 18.	50.00	
Oct. 20.	50.00	450.00
Payment.		
Sept. 17.	3000.00	3000.00

Q. Does this record you have handed me, Mrs. Holmes, represent all the payments that have been made to you of interest and principal on this mortgage?

A. It does. My attorney has not received any payments for me which have not yet reached me. All payments have been made directly to me. The loan covered by this mortgage was made by the attorney for the estate, Mr. Hugh Foster in Globe, from the bank in Globe, and it was done after consulting with our bondsmen Mr. Greer and Mr. Robinson. I couldn't recall the date approximately that these [122] arrangements were made. It was just before January, 1921; early in January, say, 1921, or the latter part of December. Mr. Shute wrote me about the loan, asking for it, and then later Mr. Foster telephoned—he sent—asked me about it. I have the letter that I received from Judge Shute in reference to this loan with me. It is rather a personal letter (producing letter).

Q. Mrs. Holmes, will you please examine this letter, "G. W. Shute, Superior Court Judge, Globe,

(Deposition of Mary E. Holmes.)

Arizona," dated "Dec. 8, 1920," and addressed, "My dear Mrs. Holmes," and state whether or not this is the letter that you have just referred to as having been received from Judge Shute?

A. It is.

Q. Now, Mrs. Holmes, will you read the first two pages of this letter so that the court reporter may take it down, and then we shall omit the personal part that you have referred to as having no connection with this mortgage?

A. Do you want me to begin at the beginning?

Q. Yes, if you will; we want all parts referring to the mortgage, and the personal references may be omitted that have nothing to do with this case.

(Witness reads:) "My dear Mrs. Holmes: I am glad to have your letter of December 3. I probably should have written first, but I thought that inasmuch as Mr. Foster was handling your business, it would be better to take the matter up with him direct, which I did. The property we were desirous of buying is the old Spates-Griffin property at the corner of Cottonwood and Second Streets, I believe. Anyhow, it is the property that adjoins Snell's on the east side. It consists of half the block on Cottonwood and more than one-fourth on Second Street, the block there being rectangular and not square. The improvements consist of two-story house of seven or eight rooms erected by Dr. Spates at a cost of [123] about $6,000, but in my opinion he was stung; a large frame garage about 35 by 18 feet; a barn about 35 feet long, including saddle

(Deposition of Mary E. Holmes.)

and wash-house. The whole lot along the south and west sides is enclosed by a concrete wall and iron fence built by John Griffin. The back part of the lot they have enclosed by picket fence of one-inch boards about seven feet high. They are asking $7,500 for it. The present owner, Mr. Sanders, paid $7,000. I think he paid too much. But I do believe the place is well worth $7,500. The room is attractive to me. The lot looks something like this (picture).

"I pay $1,000 and give you a mortgage on this place and our own to secure the loan. We have been offered $5,000 for our own place, but we think it would be better to hold it and rent it for $60." That has nothing to do with this, because I didn't take that loan. "Mr. Foster told me that Mr. Greer had promised to write you and then was called East on his mother's illness very suddenly, which accounts for the failure to write."

I received this letter at 40 Algonquin Road, Chestnut Hill, Massachusetts. I did not receive another letter from Judge Shute in connection with this mortgage loan. At that time or subsequently I have not had any communications from him in regard to this matter other than the payment of interest and principal on the mortgage. My attorney, Mr. J. Harvey White, has just said he received letters from Judge Shute.

(Whereupon witness produced letter in reference to mortgage loan handed her by Mr. White, her attorney.)

(Deposition of Mary E. Holmes.)

Q. Mrs. Holmes, I show you a letter headed, "Armstrong, Lewis & Kramer, Lawyers, First National Bank of Arizona Bldg., Phoenix, Arizona," dated "August 29, 1928," addressed to "Messrs. Parker and White, Counselors at Law, 14 Beacon Street, Boston, Mass.," entitled "Re Estate McKillop." Will you examine this letter and state whether or not the signature thereto attached, "G. W. Shute," [124] is the signature of Judge Shute referred to in this case? A. It is.

Q. Will you examine the next to the last paragraph in this letter and read it so that it may be incorporated in the record of this deposition?

(Witness reads from letter produced.)

"Referring to the bankruptcy proceedings concerning which you ask, beg to advise that the McKillop note was never listed in the estate in view of the fact that the debt and the property belong to Mrs. Shute exclusively and is her separate estate. The adjudication thereon was had as of the 17th day of April, 1928. There is but one creditor."

Q. Is this the first notice that you had that this property was regarded as the separate property of Mrs. Shute—Mrs. Jessie M. Shute—wife of Judge George W. Shute?

A. I supposed it was her property.

Q. Have you ever received any other communication from Judge Shute stating that this property on which you hold the mortgage is regarded by him as the separate property of his wife?

(Deposition of Mary E. Holmes.)

A. That letter which you read, I suppose—I gathered from that that it was the property of his wife.

Q. What letter do you mean, Mrs. Holmes?

A. The first letter, wherein he asked for the loan.

Q. May I have that other letter, please?

A. (Handing letter to Miss Cottle.) His use of the word "we"; I supposed when I was making the loan I was making it for a homestead or a home for them.

Q. Then you didn't understand at the time that you made the loan that this was to be regarded as the separate property of his wife; you understood that this was to be what is known as community property in Arizona, as held by husband and wife?

A. No, I supposed it would be the same as I hold my home; it [125] would be Mrs. Shute's home. I have said I thought it was to be a home—their home. I supposed it would be the same as it would here, the same as I hold my home. It was my property. That was the way I took the letter when it came. As to my object in having Judge Shute sign this mortgage note if I believed the only liability was on the part of his wife, I would have to leave that question to the attorney because I was not there at the time. The note was made by Mr. Foster as attorney. I don't know anything about the actual proceedings which led to the making of this loan. These matters were attended to through my attorney in Arizona and through my bondsman, and I was in the east at that time. The letter of

(Deposition of Mary E. Holmes.)

December 8, 1920, is all the letter that I find that I personally have received from Judge Shute in reference to the mortgage loan. I mean by that that the letter of December 8, 1920, is the only letter that I find that I received from Judge Shute at the time these negotiations were being made. I have not since that date received any letter from Judge Shute in reference to this mortgage loan. Referring to a letter (exhibited to witness) headed "Armstrong, Lewis & Kramer, Lawyers, First National Bank of Arizona Bldg., Phoenix, Arizona," dated August 14, 1928, addressed to Mrs. Mary E. Holmes, 40 Algonquin Road, Chestnut Hill, Mass., and signed "G. W. Shute," I don't remember having it, and I didn't have it in my file (witness examines letter). I evidently received this letter from Judge Shute. It is his signature at the bottom of the letter. I will read the last paragraph on page 1 of this letter into the record, as follows: [126]

"The insurance on the house has been kept up and I should have sent you the policies. They have been renewed and paid from time to time, so that the full protection is there for any interest which you may have. The proceedings here can in nowise affect your interest. In fact, it has been left as it is with the express purpose of protecting me in a way on question which I knew would arise relative to the house. The property in Globe belongs exclusively to Mrs. Shute and has from the beginning, but there is always some question in matters of this kind, and it was with this in view that I did

(Deposition of Mary E. Holmes.)

not pay the entire mortgage at the time I remitted you the $3,000. I hope it has not inconvenienced you in any way and that you will not be bothered with it. In case any question should come up you are at perfect liberty to tell them just exactly what the situation is as you know it. I do not anticipate this. But I think it only fair that you should be left so that you may explain anything from your own viewpoint that you may be asked to explain."

I have known Judge Shute and his wife since 1912. He was an intimate friend of my son-in-law, Archibald C. McKillop, who died in 1919. I first met the Shutes in Globe when I was visiting at my son-in-law's. I saw Judge Shute and Mrs. Shute when I was in Arizona as neighbors or friends, but I have no recollection as to the number of times in one week that I would see them. Their residence was within walking distance, and we visited the Shutes back and forth in a friendly way. Judge Shute has befriended me. He was a friend in need, a friend indeed. He was of assistance to me and my daughter's family at the death, burial and settlement of the affairs, and rendered a service that very few men probably would have rendered to us. I feel that I owe Judge Shute a debt of gratitude, and in so far as is within my power I would not do anything to injure him or to thwart his [127] desires. I believe that Judge Shute would like to have this property regarded as the separate property of his wife if it is the separate property. I have never been notified that bankruptcy proceed-

(Deposition of Mary E. Holmes.)

ings have been pending against him. I have had no notice of any kind that Judge Shute has been adjudicated a bankrupt. In May of this year I did have a letter from Miss Alice M. Birdsall of Phoenix, Arizona, in reference to this mortgage in question. I have that letter with me. (Witness produces and identifies letter). On examining this letter I note that it refers to this Shute mortgage, so that in May, 1928, I did know through this letter of Miss Birdsall's that Judge Shute had filed a petition in bankruptcy. I wrote Miss Birdsall a personal letter in reply to her letter.

(Letter produced and identified by witness, as follows:)

"Have just sent you a night letter that will be a disappointment to you; but our lawyer after reading your letter very carefully decided as you gave no clue as to your connection with the case, I had no right to disclose a matter that was between Judge Shute and myself to anyone whose connection with the case was not clear.

"Judge Shute was too good a 'big brother' to us in out time of need for us to do a single thing to embarrass him now in his misfortune. I am sorry to seem discourteous but I am sure you will understand my position, and respect my wish not to embarrass Judge Shute.

"Sincerely,

"MARY E. HOLMES."

The telegram you show me addressed to Miss Alice M. Birdsall, 421 Fleming Bldg., Phoenix, Ariz.,

(Deposition of Mary E. Holmes.)

dated "Newton Center, Mass., May 28, 1928," is a telegram sent to Miss Birdsall in reference to this mortgage. It reads as follows:

"I am perfectly willing to give the information for [128] which you ask to such a person or persons as are entitled to it but do not feel it would be right for me to give it to anyone whose connection with the case is not disclosed.

(Signed) "MARY E. HOLMES."

I do not know the meaning of the term "purchase money mortgage." I have never bought any property. When I made this loan I understood I was advancing this money for the purpose of purchasing this property so that the Shutes might have it for their use. I don't think I have any other letters from Judge Shute with reference to this matter that I have not produced here to-day.

I do not know exactly what the balance is due on this note. There is approximately $500 on the face of the note and between four and five hundred dollars interest. I couldn't tell you exactly. You can get those figures from Graham Foster. He has them.

Examining letter headed "Armstrong, Lewis & Kramer, Lawyers, First National Bank of Arizona Bldg., Phoenix, Arizona," dated "April 9, 1925," addressed to Mr. Daniel A. Rollins, 148 State Street, Boston, Mass.," signed "G. W. Shute," and with the words "cc to Mrs. Mary E. Holmes," appearing at the bottom of the letter, that is Judge Shute's

(Deposition of Mary E. Holmes.)

signature to the letter, but I couldn't say whether or not I received a copy of the letter. It refers to the mortgage property and reads as follows:

"Dear Sir:

"Replying to your favor of March 27th, 1925, re loan to Mary E. Holmes, Guardian, I have held up answering your letter for a few days owing to the fact that there has been pending for some time sort of tentative arrangements for a deal for the property on which Mrs. Holmes holds the mortgage.

"I am in receipt this morning of a letter from the real estate man representing me in the matter stating that within five days they should know whether or not the deal goes through. [129] If so I shall, of course, clean up the whole matter instantly, otherwise am writing Mrs. Holmes to-day what I expect to do. I understand fully the position which Mrs. Holmes occupies and will act accordingly.

"Very sincerely yours,

"G. W. SHUTE."

And at the bottom:

"GWS–d.

"cc to Mrs. Mary E. Holmes."

Examining letter headed "Armstrong, Lewis & Kramer, Lawyers, First National Bank of Arizona Bldg., Phoenix, Arizona," dated October 21, 1924, addressed to me and signed "G. W. Shute," I received this communication from Judge Shute, and it refers to the mortgage in question. Omitting

(Deposition of Mary E. Holmes.)

the personal references in the letter, it is as follows:

"Dear Mrs. Holmes:

"Your letter of September 23rd I found upon my desk upon my return from a hunt where I had been for a couple of weeks. I have neglected answering for several days due entirely to my being unable to get my own work out of the way. I hope that you will not think that I have neglected you.

"I note what you say about closing up the estate in Arizona, and really I see no reason why it should not be cleared up entirely as soon as you can get the loans out of the way, and my own in particular. I am very glad that the others have all been cleaned up and am trying very hard now to dispose of the place at Globe which would enable me to clean up with you entirely. I was offered $6,000 for the place by Mr. Graham Foster but I did not consider it a good offer as I paid considerably more than that for the place and I have put a good many improvements on it of permanent value to it and I believe I can at least add to it $500 by holding on a little while." [130]

"When I came to Phoenix of course many of the things that I had in the way of check-books, receipts and so on, I have misplaced so that at this time I am unable to go back over my canceled checks to determine just the exact amounts that have been sent you. The bank-book I have, however, contains the items entered in your little slip without change except one. I find an item on April 17, 1922, $87.50, which is not upon your list. I will endeavor to find

(Deposition of Mary E. Holmes.)

the canceled check so that there will be no error in that."

Referring to the personal memorandum which I produced and which has been read into the record, of the payments of interest and principal on the Shute note, the $3,000.00 payment came as a check signed "G. W. Shute," but I know nothing about the source. Mrs. Shute never sent any check or payment on this mortgage loan only through her husband. Remittances have all been made by check signed "G. W. Shute." I have never received personally or through my attorney any other letters or telegrams or other communications in reference to this Shute mortgage prior to or since I made the loan. I expect Mr. Foster has filed a claim in the Bankruptcy Court for the balance due on this mortgage and note. I have not personally filed a claim in the Bankruptcy Court. I have authorized my attorney, Graham Foster, of Globe, Arizona, to file a claim for me. I couldn't give you the date I gave notice to Mr. Foster that I desired him to file a claim because it was done through the attorney for the estate, who is in California. The attorney in California is Hugh M. Foster. His address is 334 Security Building, Los Angeles, California. I have no personal knowledge as to whether a bankruptcy claim has been filed for me in connection with this loan of mine. I asked Mr. Hugh Foster to attend to the matter. I wrote to him personally, but have not a copy of the letter. It was written about the 20th of August of this year. [131]

(Deposition of Mary E. Holmes.)
(Examination by Miss BIRDSALL.)

Mr. Graham Foster has not held this note for collection from the time the mortgage was made. The note was never in my possession. Hugh Foster has had that note. Well, the Old Dominion Bank held it, and I think Mr. Graham Foster has it now for collection. Mr. Hugh Foster left all my papers with the Old Dominion Bank. I could give the date since when Mr. Graham Foster has held the note if I had the letters that I had from the bank, but I couldn't tell you the exact date, but I should think possibly he had had it less than a year. I have endeavored to collect the note up to—yes, we have been endeavoring to collect it, yes. The only statements or letters from Judge Shute I have had that he was unable to pay this up in full at its due date are those which you had. The letters you had are the only letters I recall he has written on the subject. I did not know that Judge Shute's income for the year 1927 was over $16,000.00. I had no information on that subject. I don't recall receiving any letter from Judge Shute in relation to this matter in April or May, 1928, or at approximately the time he filed the petition in bankruptcy in April, 1928. If Judge Shute testified in the Bankruptcy Court that he wrote me in April this year concerning this, I would not say he was mistaken. I will look at my files and my letters and see. I have written him that Mr. Foster has the note and the amount due upon it, but I couldn't give the date when I did it.

(Deposition of Mary E. Holmes.)

I couldn't say whether it was since the first of 1928. I will look through my file of letters. I made one search but I didn't look especially for any letter asking about any—personal letters I have had to him relative to the note. I mean, suppose I had written and asked him for a settlement of the note, and his reply, I wouldn't think that that had any bearing upon this. (Discussion by counsel and commissioner as to letters covered by subpoena and not produced and stipulation entered into [132] for their production.)

The COMMISSIONER.—By agreement of counsel for the trustee and for J. J. Mackay and counsel for Mrs. Holmes, Mrs. Holmes is to [133] make a further examination of her files and will produce such further correspondence as she may have from Judge Shute relating in any manner to the note and mortgage in suit, and such portions or the whole of those letters may be introduced into the record to have the same effect as if Mrs. Holmes had testified to each and every one and the contents thereof.

In accordance with the agreement of counsel as stated above by the Commissioner, the following are copies of letters and portions of letters produced by the witness:

(NOTE: All letters, except where otherwise noted herein, are on the letter-head of

ARMSTRONG, LEWIS & KRAMER
Lawyers
Phoenix, Arizona
First National Bank of Arizona Bldg.)

"September 21st, 1923.

"Mrs. Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

* * * * * * * * * * *

"I have the usual luck in renting the house in Globe. The first tenants we obtained I got rid of at the end of the first month, and in order to put the house back in rentable shape it cost me $198.00. We have some tenants in now that have been there for two months and are quite good, and have paid off the first shortage. The taxes are due next month, and will be paid when due. I am glad you feel as you do about your loans, and without doubt the interest will be forthcoming soon. I feel as you do about your street railway stuff, for it is very uncertain value in nearly all the states." [134]

* * * * * * * * * * *

"Sincerely yours,
"G. W. SHUTE."

"April 9, 1925.

"Mrs. Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

"I today answered Mr. Rollins' letter as per copy of which I enclose you herewith. As you will see I am not committing myself to Mr. Rollins in any way except that I am promising to take the matter up with you to a final determination.

"Supplemental to my letter to Mr. Rollins I wish to say that Mr. Keegan this morning advised me that he had a prospect of a sale of the place. It sounds almost too good to be true but strange things happen here with us and I do hope that the deal will go through; if it does not, however, I shall be very glad to do anything that you or Mrs. McKillip ask me to except to pay the full amount of the loan.

"The taxes are paid up until the end of 1923; the first installment of the 1924 taxes is now due and will be taken care of very shortly. The place is insured fully as per insurance policies which you hold, and if I am not mistaken, in the amount of about $6000, at least ample to protect the loan in case of fire. The place, as you know is worth about $7000. I paid $6500 and put in a considerable amount of improvements that would run it well up over the additional $500 mentioned.

"If Mrs. McKillip would like I would deed the place to her; do not deem this advisable, however,

for the reason that it would simply mean that she would be compelled to look out for it and have a piece of property in a strange land which she would not [135] want to sell for what she has in it. It seems to me far preferable that I pay up the interest, and to this end will pay as fast as I can on the past due interest, which should not take long now, and turn over to her the rent of the place which now amounts to $50 per month. This rent has been used in taking care of taxes and improvements that I have mentioned to you heretofore but which are now up. It was necessary to do this in view of the fact that I was unable to meet these insistent demands in any other way as what I have been making here did not justify it. This, however, is entirely beyond the point for it does not interest you much, but I do hope that the matter will be straightened up to your entire satisfaction before long.

"Please remember me to Mrs. McKillip and Laura.

"With kindest regards, I am

"Very sincerely yours,

"G. W. SHUTE."

(Copy.)

"April 9, 1925.

"Mr. Daniel A. Rollins,
"148 State Street,
"Boston, Mass.

"Dear Sir:

"Replying to your favor of March 27th, 1925, re loan to Mary E. Holmes, guardian, I have held up answering your letter for a few days owing to the fact that there has been pending for some time sort of tentative arrangements for a deal for the property on which Mrs. Holmes holds the mortgage.

"I am in receipt this morning of a letter from the real estate man representing me in the matter stating that within five days they should know whether or not the deal goes through. If so I shall, of course, clean up the whole matter instantly, [136] otherwise am writing Mrs. Holmes today what I expect to do. I understand fully the position which Mrs. Holmes occupies and will act accordingly.

"Very sincerely yours,

"GWD–d.

"cc to Mrs. Mary E. Holmes."

"May 26, 1925.

"Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

"My letter is delayed some ten or twelve days to you, due entirely to the fact that I have been en-

gaged in the trial of a case in the northern part of the State and got back into the office today for the first time.

"Your letter relative to the interest rather astounded me; to tell you the truth I did not know I was so far behind with the interest payments. It is strange how we let things go when there is not something prodding us up.

"I am enclosing you herewith Dr. Phillips' check for $50.00 and my own check for $87.50, being three months plus.

"I am going over to Globe on Saturday and am going to undertake to do something with the place. The chances for selling it at what I am asking are rather slim, but I do think that I will be able to knock off $500 or $1000 from it and in this way dispose of it. Will let you know the outlook as soon as I return. Globe, I am told, is very slow. Copper is in a bad way and as a result of that all business is in a bad way in the city, but however that may be, it seems to me that I ought really to be able to get rid of the place very soon. I wish you to know that whatever your determination may be in this matter, I shall be very glad to meet [137] it in the spirit in which you give it.

"With the very kindest of regards, I am,

"Very sincerely yours,

"G. W. SHUTE."

"June 5th, 1925.

"Mrs. Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

"Since writing you the other day I have made a trip to Globe, and I am sorry to say that it now appears that I am going to have some trouble in selling the place. I have two nibbles, however, one from Mr. Pinson who is manager of the Penny Store, and who now lives in Globe, but he will not be able to give me a definite answer until he returns from a tour of inspection he has gone on, which will probably be about a month. Mr. Keegan writes me that Mr. Dougherty is in the market for a place of the character of mine, and he will see what he can do with him. Also, I am considering getting the money elsewhere to take up the loan.

"Dr. Phillips has sent me a check, somewhat in advance of the time it is due, for rent for the month of July 15, 1926, which I enclose herewith. He sent it because he is going away for a while, and wanted the rent paid before leaving. I will be able to send you an additional three months' interest before the end of the month.

"With kind regards, I am

"Yours sincerely,
"G. W. SHUTE."

"July 18, 1925. [138]

"Mrs. Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

"Enclosed herewith please find check for $50.00, being the rent on the Globe place from July the 15th to August the 15th, inclusive.

"I wrote you at the time of sending the previous check that I expected to send you another quarter's interest before the end of the month. It has been such a dry time around here for us that I found this impossible, and was also disappointed in securing the sum of money through some other property that I had rather counted upon. I trust, however, that you will forgive this misrepresentation, if such you may call it, for I surely tried to do it.

"I think I told you that I had a talk with Mr. Pinson of the Penny Stores people, and I have high hopes of getting rid of the place to him. He has been gone on a survey of the stores however, for a matter of six weeks or so, and I have not been able to get in touch with him. He is to give me his answer upon his return. I have one or two other nibbles that may materialize, and in the event they should not, I have a chance of getting the money from another source to pay off this loan. I have been dragging it along somewhat, inasmuch as it appeared

that I would be able to eliminate the property and the debt at the same time.

* * * * * * * * * * *

"Very sincerely yours,
"G. W. SHUTE." [139]

"August 17, 1925.

"Mrs. Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

"I beg to enclose you herewith check of B. E. Phillips for $50.00 made payable to myself, which I have endorsed to you. This is the rent on the Globe property up to and including the 15th day of September, 1925.

"When in Globe recently I had a talk with Mr. Pinson whom I told you about, and he still delays the matter by saying he does not yet know exactly what his future course will be relative to business in the Globe district. Both Mr. Keegan and myself are trying hard to interest one or two other parties, and I am taking the matter up today with John Dougherty who I understand is in the market for a place.

"It has been very quiet here this summer. In fact, so quiet that we have been compelled to rather adjust ourselves to the circumstances. We hope, however, that it is only during the months of July and August, which is generally the case.

"With kindest regards to yourself and all the other members of the family I am

"Very sincerely yours,

"G. W. SHUTE."

"February 18, 1926.

"Mrs. Mary Holmes,

"40 Algonquin Road,

"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

* * * * * * * * * * *

"Referring to the first mortgage on my place, the [140] situation is simply this. It can be sold at any time for more than enough to pay off the mortgage. On the first of the year I made a contract for the sale of some mining property out of which I will realize at the end of this year $4,000 over and above all other income that I have. This money should come in without fail, as the contract for the purchase of the property is going along until the people who are taking it have invested some $25,000 already, and they will be obliged to take it because of the expenditures thus far made. As I have heretofore told you, however, I would far and away prefer doing just what you want me to do in this matter, and if you would rather, I will deed it to Mrs. McKillop at any time she may ask me to. I think I explained, however, that this would not give her the income from it she now has because of the expense incidental to keeping it up, as she will get the $50 per month as she has been getting it regularly. The matter, however, will be taken up this

year whether it rains or whether it shines, for it is a dead horse indeed to me.

* * * * * * * * * * *

"Yours sincerely,
"G. W. SHUTE."

"March 22, 1926.

"Dear Mrs. Holmes:

"Enclosed herewith please find personal check for $50.00 being the usual monthly interest payment on my loan.

"It was delayed a few days because of my absence from town.

"I was unfortunate enough to lose Dr. Phillips as a tenant. He bought the Eugene Miller property, just at the top of the hill. I have two prospective renters and think I'll get a good tenant out of these two, and am trying to get $60. for the place instead of $50.00. [141]

"I saw Hugh Foster when I was over there some days ago, and told him of your letter to me and he at that time told me he would prepare the necessary papers for our signatures, whatever they are. However, I found he had been called to Calif. on account of the illness of his wife and there seems to have been no attempt made to carry your wishes into effect. However, we will sign anything at any time and you may depend upon getting your interest monthly and a little upon the past due

stuff until he gets around to it and I'll then bring it all up to date.

* * * * * * * * *

"Sincerely yours,

"G. W. SHUTE."

"April 19, 1926.

"Dear Mrs. Holmes:

"Enclosed herewith please find check for $50.00 to apply.

"The place is not rented, but I have been expecting to hear daily from a fellow who, in consideration of our putting in a little furniture, will pay $60.00 for the place.

"We are all well. Have had a most unusual spring.

"Remember me to Mrs. McKillop.

"Sincerely,

"G. W. SHUTE."

"May 20, 1926.

"Mary A. Holmes,

"40 Algonquin Hill,

"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

"Enclosed herewith please find check for $50.00 to apply on the matter of the loan.

"The last time I was over to Globe I was told that Mr. [142] Foster had given up his practice in Globe and had moved to California. He did not come to see me as he passed thru and I am

wondering whether or not you have been depending upon either Mr. Foster or me to get rid of your matters in Globe.

"The house has been vacant for this is the third month, and while we have had one or two applications to rent it, the people who desired it were not such as we want in the house and in consequence it has remained vacant. We have been negotiating for the past month for a sale of it but I do not believe that the people who are inquiring are very much interested in it unless they can get it for half what it is worth. That seems to be about the run with property in Globe at this time. However that may be, I expect to put a little money on it this summer and keep it looking as though it really belonged to some one, and probably by the beginning of winter I will be able to turn it to someone to our mutual advantage.

"In any event, I do not believe that the loan will be carried longer than this year as I have the money coming in almost certainly to take it up at the end of the year—that is, by the first of January, 1927. I will pay you along as I have been doing, $50.00 per month, so that the interest will be kept well out of the way and a little applied on the amounts that are past due. I do hope this will be satisfactory, and unless the conditions are such that you need it, it does seem to me that you are getting a good rate upon your money, for, as you

well recognize, the rate of interest is exceedingly high.

* * * * * * * * *

"Very sincerely yours,
"G. W. SHUTE." [143]

"June 17, 1926.

"Mrs. Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

"Please find enclosed herewith check for $50.00 to apply on loan. I am sorry that the house has not yet been rented. I have had two or three nibbles for it but nothing that I cared to accept. I have lately had the year and place cleaned up so that it looks real well. There can be but little doubt but what it will be rented during the winter, but whether it will or not makes small difference to me in sending the payments, for they will come from month to month whether the place is rented or not.

* * * * * * * * *

"Very sincerely yours,
"G. W. SHUTE."

"July 17, 1926.

"Mrs. Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

"Dear Mrs. Holmes:

"Please find enclosed herewith check for Fifty Dollars ($50.00) to apply on my note.

"I had a letter from Mr. Foster the other day and in the letter he expressed the same thought to me which you have communicated to me several times, namely, that I reduce the amount of the principal and then pay the $50 per month as I have been doing. I have not answered Mr. Foster's letter for the reason that I did not hardly know how to answer it, for I could but say to him, as I now say to you, that if I had the money necessary to pay off this note I would do it tomorrow. There is a chance that I might get [144] a little money very soon and if I can I will borrow it and pay off the entire amount.

"Mr. Foster spoke something about the taxes, I have not paid the taxes for the last year and this year, however this will be done, and you need have no fear or anxiety along that line. The place is unrented but I have two or three people who are looking at it and I believe that I can put in $100 or so in refinishing it on the inside and it will readily rent by the time school opens September 1st.

* * * * * * * * *

"Very sincerely yours,

"G. W. SHUTE."

"Aug. 17, 1926.

"Dear Mrs. Holmes:

* * * * * * * * *

"You are right everywhere. There can be no question about that. It is not disposition Mrs.

Holmes it is dire necessity. I have had a lot of undiluted hell the last four years, but I think I can see the rising sun. I will pay the taxes this month. I think also that very soon I'll pay the whole loan. Counting chickens before they are hatched has been a grave fault I'm not going to do that any more—But think I can see my way.

* * * * * * * * *

"Ever your friend,

"G. W. SHUTE."

"September 17, 1926.

"Mrs. Mary E. Holmes,

"40 Algonquin Road,

"Chestnut Hill, Mass.

"Dear Mrs Holmes: [145]

"Enclosed herewith you will please find check for $3000 to apply on mortgage on the Globe place. I am very glad to say that I had all of this money to pay you so as to retire the mortgage in full but father's unfortunate illness and death took about $2000 of the amount I had to pay the debt, and hence you will be a few hundred dollars short upon your account for a while yet. I expect however within the next month or six weeks to retire the whole debt, and upon the final remittance to you, will forward you the necessary discharge for clearing the record.

"You do not know how glad I am to be able to send this to you for I know that you need it. I am sorry indeed if the investment has ever caused you any worry, but deep in my heart I do not feel

that it has, and it has been drawing a rate of interest which would be impossible for you to secure any other place, at least East of the Mississippi.

* * * * * * * * *

"Very sincerely yours,

"G. W. SHUTE."

"November 16, 1927.

"Dear Mrs. Holmes:

"I do not wonder at all that you are worrying over the settlement of my note. I hope it isn't too much for you. There is no need in worrying you with non essentials, it is sufficient to say I have had a hard time since I came down here, but can now see the coming dawn.

"When last I wrote you I had the money to discharge this debt. In fact had accumulated it for that express purpose. When I wrote you I wanted your own figures in interest etc., as I did not care to figure the amount for you. It was many days before I heard from Hugh Foster in Los Angeles, and when I did hear all he gave me was the payments etc. which I already had. In the meantime [146] a pressing condition arose here which made it necessary in my opinion to use the money which I did.

"This accounts for the delay.

"I have about $2000 coming to me on Dec. 8th,

and feel sure it will be in at that time. From this I will settle your note in full.

* * * * * * * * *

"Sincerely your friend,
"G. W. SHUTE."

"G. W. SHUTE
"Superior Court Judge
"Globe, Arizona.
"November 21, 1921.

"Mrs. Mary E. Holmes,
"40 Algonquin Road,
"Chestnut Hill, Mass.

"My dear Mrs. Holmes:

"Two of the policies upon the property on which you hold mortgage have expired and have been renewed; one in The Home Insurance Company of New York, No. 1119 for $2,000.00, which expires November 15, 1924, to which is attached the mortgagee's clause running to Mary E. Holmes, Guardian; the other made out in the same manner, expiring June 27, 1924, for $1500.00, in the Great American Surety Company of New York. The Gila County Abstract Company being the agent for The Home Insurance Company, and the Copper Belt Realty Company being the agent for the Great American Surety Company, at this date.

"I have these policies here and I think it advisable for me to keep them, unless you desire me to forward them to you; but in any event file my letter so that you may have full note of the insur-

(Testimony of Mrs. George W. Shute.)

ance. I think the property is insured for six thousand [147] dollars, the other policies not having yet expired.

"Very sincerely yours,

"G. W. SHUTE."

TESTIMONY OF MRS. GEORGE W. SHUTE, FOR TRUSTEE.

Taken at adjourned first meeting of creditors before Hon. R. W. Smith, referee in bankruptcy, on November 16, 1928, there being present the referee, Thomas W. Nealon, Esq., trustee, Miss Alice M. Birdsall, counsel for J. J. Mackay, one of creditors of estate, Orme Lewis, Esq., counsel for bankrupt, George W. Shute, bankrupt, and Mrs. George W. Shute.

(Examination by Mr. NEALON, Trustee.)

I am the wife of George W. Shute, the bankrupt in this matter. My name is Jessie M. Shute. Judge Shute and I live at the same place we were living last April, #66 West Lynwood Street. I drive an Essex car. It is kept on the premises there. In last April or May I don't recall especially that Judge Shute drove that car considerably, to and from town—I suppose he did. We both used the car at that time.

Q. Now, Mrs. Shute I am showing you copy of the account, of the savings account standing in your

(Testimony of Mrs. George W. Shute.)

name at the First National Bank of Arizona; that is, this is a substituted copy, verified by Mr. Ganz.

(Statement exhibited to witness.)

I want to call your attention to the first deposit in that account in Oct. 28, 1926, of $1100.00, and will ask you where that money came from.

A. Why, I saved that money.

Q. Yes, but we will confine ourselves to the one statement, the one item of $1100.00; do you remember where that money came from?

A. I can't tell you that. [148]

Q. That is the deposit with which the account was opened.

A. It was money I had saved; I got it in different ways.

Q. Will you explain that a little more fully, Mrs. Shute; from what did you save it?

A. Well, I sold my piano in Globe and saved that money; that was one thing; then we had a schoolteacher who was rooming and boarding with me. I had her for three years, and I saved most of that money, and saved some from my housekeeping account; my husband gave me money to buy groceries and run the house, and I saved some from that.

Q. I have reference particularly to this first $1100. Is it your recollection that that fund came from the sale of the piano in Globe, money you collected from the school teacher and what you saved from household expenses?

(Testimony of Mrs. George W. Shute.)

A. I think so, yes. I don't think I remember when I sold the piano in Globe. It is since we left Globe. We came over here about the end of 1922, I think, and it was since then I sold the piano. I think it was $150 or $200 that I got for it. I can't give approximately how much I saved that this school-teacher. She was with me a long time; sometimes it would be one amount and sometimes another. I couldn't say the approximate total amount from that unless I added it up.

Q. This household account, now, and your savings from that. Prior to October 28, 1926, when this account was opened; can you give a general idea of about how much that would be of your savings?

A. Sometimes I saved more than others; sometimes my husband would give me more than at other times.

It wasn't always the same. I have tried to be economical and when I was able to save more I saved it. My daughter was married three years ago. Since that time my expenses have not been [149] lighter. I have had week-end guests and company. It wasn't any more, because she taught sshool part of the time, but there was a good deal of company. I mean subsequent to her marriage. The first deposit was $1100. Prior to depositing it in this savings account, I kept it. I did not keep it in the bank. I kept it with me.

Q. You have never had any bank deposit prior to the time of this deposit?

(Testimony of Mrs. George W. Shute.)

A. I think I have, but I don't know whether I ever did here or not. Do you mean here in Phoenix?

Q. Yes, in Phoenix.

A. I don't think so,—did I (to Judge Shute). He thinks I didn't.

Q. Was any of this first deposit of $1100 transferred from any other bank to this? A. No.

Q. You just had the money in your possession?

A. Yes.

Q. Well, we will take the next deposit of $500,—November 18, 1926; man you tell me the source of that deposit?

Judge SHUTE.—I can suggest it to her, so she will remember, with your permission.

The TRUSTEE.—If it will help her to recollect.

Judge SHUTE.—I think that was those two little checks I gave you, when Virginia and Eileen were over there, don't you remember?

Mrs. SHUTE.—I don't remember.

The TRUSTEE.—Even after Judge Shute has refreshed your memory you do not recall?

Mrs. SHUTE.—No, I just don't remember. Let me see, that was the year Dad died, wasn't it (to Judge Shute) I am sorry, but I just can't recall.

Q. On June 24th, 1927, there is another deposit of $500.00; [150] have you any recollection of where you received that money?

A. Yes, I saved part of that money.

Q. And the part you did not save?

(Testimony of Mrs. George W. Shute.)

A. Probably my husband gave me some; he sometimes gave me $20 or $50.

Q. And you would save that?

A. I would try to.

The deposit of $100 on July 21st, 1927, I may have saved; I can't remember. The similar sum of $100 on August 22, 1927, I remember. That was when I came back from California; I had saved that much. My daughter was with me that summer and she helped me. The $100 on September 9, 1927, I think I saved, and the $100 on September 22d of the same year. The deposit of $50.30 on November 15, 1927; I had a house in Globe that I always received rent from until you levied on it; I got about $50 a month for that, and I always put that in the bank unless I had to pay insurance or taxes with it. I always had the house rented, and it paid $50 a month. I cannot recall, except as I have told you, the source of the deposit of $1050.20 on January 4, 1928. I just gathered it up. I don't think I have any independent recollection of that deposit of $50 on the same day. The deposit of $60 on February 28, 1928; I think, after the 20th of the month that way, it would be savings from the house; sometimes I would have $10 or [151] so left over, and I would put that with it, and the deposit of $50 on March 17, 1928, was the same thing, I suppose. Referring to the deposit of $100 on April 14, 1928, I will ask Judge Shute about the source of that. Sometimes my husband gave me $20 or $50 and sometimes I would have $10 or $20 left over, and

(Testimony of Mrs. George W. Shute.)

when I did I always put that in. I remember the circumstances of the $1500 which was withdrawn on April 14, 1928. I took it out for my daughter. The money was paid to Mr. Creed, my daughter's husband, who wanted to buy a little grocery store in Gilbert with his father. That was what the money was for. They called it a loan, but I never expected to get it back. I received a note for it which I have in my possession. All the money described in this account has been withdrawn from the bank except $200 or $300. When I ceased to get the rent from my house in Globe, I asked why and was told that you had levied on my house there and instructed the tenant not to pay me the rent, and I called Clifton Mathews of Rice and Mathews and asked him what I could do and if he would look after my interests there for me, and he said he would. He said for me to draw the money out. I drew part of it out and paid him his fee; part of it I drew out for my own expenses. Mr. Mathews is my attorney in regard to the matter. The rest of the money is in the bank, I suppose. I mean the $200. I probably have spent all except the $200 in the bank. I paid him out of it. My husband talked to him about the bankruptcy proceedings. I do not know whether anyone else was present at these talks with Mr. Mathews. Mr. Mathews was not present at the time the money was drawn out. I went alone to get it, and cannot tell you the name of the teller. It was not Mr. Armstrong or Mr. Ganz or an officer of the bank that I saw when I

(Testimony of Mrs. George W. Shute.)

drew the money out. I remember the circumstances of a note executed by Joe Noble and endorsed or guaranteed by Judge Shute. Mr. Noble personally asked me to loan him $1200, that he was in financial trouble, and [152] I loaned him the money. I don't know whether the note is to the First National Bank of Arizona. He was to pay the bank so much a month, and then it was to be transferred to me so I could get the interest. If it appears on the books of the National Bank of Arizona as being a loan of $1200 made by them on October 18, 1927, the note was probably made to the bank. I didn't sign the note as surety. He signed it for me. Mr. Noble and I were there when it was signed.

Judge SHUTE.—If I may tell her just what the circumstances are she would remember. You tell Mr. Nealon (to Mrs. Shute) just what the circumstances were; how you met Joe Noble, and what you were doing, and how it came about and then you will remember that I fixed the arrangements with the directors of the bank. Tell Judge Nealon where you met Joe, where it took place, and then you will recall it.

I think I was in Goldwaters' store, and Mr. Noble came in and said he was in great trouble and wanted me to help him. He said he had told my husband about it and that he couldn't do anything for him, that his only chance would be to ask me, and then we went up to my husband's office and Mr. Noble and I talked about it, and Mr. Shute said he would go downstairs to the bank and see about it, and he

(Testimony of Mrs. George W. Shute.)

did. I think I went home, and Mr. Noble came to the house that night, or very soon after. I felt awfully sorry for him, and Mr. Shute said he could fix the matter up for him, and he did it. The note was paid on February 27, 1928, by withdrawal from my account of some $1200. We had kept it there hoping that he would pay $40 or $50 a month on it.

(Examination by Miss BIRDSALL.)

I don't believe I can tell you the date that I drew the savings account from the bank on the advice of Mr. Mathews. It was some time in June, I think, I called Clifton Mathews on the telephone from my house, but can't remember the date. [153]

Judge SHUTE.—I remember it was right after one of our rows about the house.

I hadn't had any rent from the house, and I think the fire insurance was due on it. I can't tell you how long it was after I called him up before I withdrew the money. I don't think I withdrew it all at once. I think I took out $1000. I wanted $500 to use for an expense of mine—of ours. Then I went to California during the summer and I suppose spent it in different ways. Mr. Mathews told me I could draw it out if I wanted to after I had told him of the conditions. I have spent all of the amount that I withdrew. I have not deposited it elsewhere. I paid Mr. Mathews $150 for his fee. The $1100 approximately with which I started this savings account I have testified I had in my personal possession. I had part of it in the house in

(Testimony of Mrs. George W. Shute.)

currency and part of it I had on my person. Sometimes I would have $20 and sometimes $50, that would make $70; by and by when it got up to $1000 or more and I was afraid to keep it any longer, I put it in the bank. I got as much as $1100 collected that way before I deposited it. I had a deposit when I lived in Globe, but I had withdrawn that from the bank before this. It took all we had to live. Virginia was going to Teachers College and we were heavily in debt when we came down here. I can take you out and show you in the hall the place where I carried the $1100 with me. I have often carried $1000 with me. The $1050.30 that was deposited on January 4th last in this account was money I had saved up and had around the house the same way. He might have given me $50 or something like that. I don't recall receiving the large amount from any particular source. The $100 deposited in November and the $50 in December probably came from the rent for the house. When Eileen stayed with me I usually put that money in the bank. She was one of the family and I didn't go to much extra expense for her. [154]

(Examination by the TRUSTEE.)

I have the Noble note and Creed note in my possession.

Judge SHUTE.—I would like to make a little statement so that Mrs. Shute will remember about this money deposited. You will remember (to Mrs. Shute) after Aunt Mary's death, the property in

(Testimony of Mrs. George W. Shute.)

Prescott was sold to Johnny Robinson, and that I used the money secured from this property in living expenses and other matters around Globe; you remember, don't you, that after that money came in, we used it in the purchase of that little bunch of cattle, and that we had an arrangement that I should return this money to you as fast as I could.

Mrs. SHUTE.—They were part my cattle.

Mr. SHUTE.—And I didn't get anything out of the cattle—

Mrs. SHUTE.—You certainly didn't.

Judge SHUTE.—And that after we got on our feet down here I began to make up to you this money that I had misused for the sale of this property.

Mrs. SHUTE.—Yes, I remember that.

Judge SHUTE.—After we moved to Roosevelt Street, the arrangement was made that I should return as much of this as I could, to make up to you for that. Now, do you remember after we came down here, and after Mr. Duncan had rented the place in Globe, one of the conditions of our arrangement was that whenever the rent came in for this house, I was to add $50 to it, and when these deposits of $50 and $100 were made, it was in pursuance of the arrangement we had made, and all of the moneys deposited had either been saved or I had made them up, for the amount of money I had used for the sale of the property at Prescott, belonging to you. Now, coming to Mr. Mathews, you

(Testimony of Mrs. George W. Shute.)

remember do you not, that after I had been served with notice, I advised you to secure your counsel?

Mrs. SHUTE.—Yes. [155]

Judge SHUTE.—Do you remember you asked me who you had better secure and I suggested Mathews?

Mrs. SHUTE.—Yes.

Judge SHUTE.—A few days after that conversation I went to Globe and saw Mr. Mathews and had him call you over the telephone and you and he talked the matter over and made your arrangement.

Mrs. SHUTE.—Yes.

The TRUSTEE.—Mrs. Shute was this understanding between you and Judge Shute in writing?

Mrs. SHUTE.—I don't understand.

The TRUSTEE.—In regard to the money as to the cattle and from the sale of the property in Prescott.

Mrs. SHUTE.—He mortgaged the Prescott property and bought these cattle, and he and his younger brother and I were to be partners. It was my property and his brother was to look after the cattle for me,—his younger brother.

The TRUSTEE.—Judge Shute's younger brother?

Mrs. SHUTE.—Yes, Frank Shute. He was to look after the cattle. We had a very hard time. We tried as hard as we could for seven years with those cattle, but we couldn't make expenses. Frank did the best he could, but I was called on for money all the time.

(Testimony of Mrs. George W. Shute.)

The TRUSTEE.—Those were bad cattle years, were they not?

Mrs. SHUTE.—Yes, my husband finally sold them and paid the mortgages off as nearly as he could on the property we had up there, but he couldn't do that,—and finally he had to sell the property to pay off everything and the mortgages on the places up there. The little house that we had left up there, the one on Devereaux Street, that was clear, we sold that and bought the house on the hill,—you remember, Miss Birdsall, where we lived.

The TRUSTEE.—That is the property you own now?

A. Yes, that was bought with the money from the cattle and [156] from the house in Prescott that had been sold.

The TRUSTEE.—Was there any agreement between you and Judge Shute in writing as to your reimbursement for these losses?

Mrs. SHUTE.—No, I don't think so.

The TRUSTEE.—You don't think there was any?

Mrs. SHUTE.—No.

(Examination by Mr. LEWIS.)

That was my own savings account, and the reason for Judge Shute having the right to withdraw it was because sometimes I would want him to bring me money out of it, and sometimes he made deposits for me. He was to add $50 to the rent money and deposit it for me. His office was right in the

(Testimony of Mrs. George W. Shute.)
bank building and sometimes I didn't want to come downtown. It was not my understanding that Judge Shute had the right to withdraw any of that money for his own use, not unless I knew about it.

It was thereupon stipulated by and between the trustee, counsel for objecting creditor and counsel for the bankrupt, that Mrs. Burns, the stenographer who took the proceedings before the referee, was qualified and would testify to the correctness of the transcript.

Creditor's Exhibit No. 1 was then admitted in evidence, as follows: [157]

CREDITOR'S EXHIBIT No. 1.

In the Superior Court of the State of Arizona, in and for the County of Maricopa.

Copy.

No. 28133.

J. J. MACKAY,

Plaintiff,

vs.

G. W. SHUTE,

Defendant.

COMPLAINT.

Plaintiff complains of defendant and for cause of action alleges:

I.

That defendant is a resident of the County of Maricopa, State of Arizona.

II.

That on the 9th day of February, 1918, plaintiff at the request of defendant, became surety for the payment by the defendant to the Gila Valley Bank & Trust Company at Globe, Arizona, of the sum of Twenty Thousand Dollars ($20,000.00), with interest; and thereupon and upon said date, plaintiff, with the defendant, and as surety for the defendant, as aforesaid, made, executed and delivered to said Gila Valley Bank & Trust Company at Globe, Arizona, a certain promissory note in writing, whereby defendant and plaintiff promised to pay to said Gila Valley Bank & Trust Company, for value received, the sum of Twenty Thousand Dollars ($20,000.00), with interest, both principal and interest payable on demand, said promissory note being signed "G. W. Shute, J. J. Mackay"; that the consideration for the execution of the said promissory note for Twenty Thousand Dollars ($20,000.00) was received by the said defendant, G. W. Shute, and that this plaintiff never received any consideration or value for said [158] note, but made and executed said promissory note only as surety and as an accommodation of the said defendant; that thereafter said Gila Valley Bank & Trust Company made demand upon said defendant, G. W. Shute, for the payment of interest due on said note in accordance with the terms thereof, but said defendant, G. W. Shute, made default in the payment of said interest due on said note, and failed, neglected and refused to pay the same upon

the demand of said Gila Valley Bank & Trust Company; that thereupon said Gila Valley Bank & Trust Company notified this plaintiff of said default by said G. W. Shute, and demanded the payment of said interest due upon said note from this plaintiff; that this plaintiff thereafter notified said defendant of said demand so made upon him and requested said defendant to make payment of said interest due upon said note to said Gila Valley Bank & Trust Company in accordance with the terms of said note, but that defendant failed, neglected and refused to make payment of said interest on said note, and that this plaintiff between the 30th day of December, 1918, and the 30th day of December, 1920, was compelled to pay and did pay to said Gila Valley Bank & Trust Company for the use of said defendant, G. W. Shute, for interest on said note aforesaid, the sum of Three Thousand Seven Hundred Six and 34/100 Dollars ($3,706.34); and that on said last named date, to-wit, December 30, 1920, this plaintiff, upon the demand of the said Gila Valley Bank & Trust Company was compelled to execute and did execute with said G. W. Shute a renewal note for the balance due on the principal and interest of said indebtedness represented by said note so executed on the 9th day of February, 1918, as aforesaid, by the terms of which renewal note defendant and this plaintiff promised to pay to said Gila Bank & Trust Company upon demand the sum of Nineteen Thousand Six Hundred Fifty and 95/100 Dollars ($19,650.95) with interest thereon at the rate of eight per cent per annum, [159] in-

terest payable on demand, said note being signed "G. W. Shute, J. J. Mackay"; that thereafter said defendant, G. W. Shute, defaulted in the payment of the interest due on said last named note, after demand made upon him by said Gila Valley Bank & Trust Company for the payment thereof, and that said Gila Valley Bank & Trust Company thereupon demanded payment of said interest by this plaintiff; that this plaintiff thereafter requested the payment of said interest by said defendant, G. W. Shute, but that said defendant, G. W. Shute, failed, neglected and refused to pay said interest to said Gila Valley Bank & Trust Company, and that this plaintiff was compelled to pay, and did pay to the Gila Valley Bank & Trust Company for the use of said defendant, G. W. Shute, the amount of Seven Hundred Eighty-six Dollars ($786.00) interest due upon said last named note; that thereafter and upon the 2d day of July, 1921, upon the demand of said Gila Valley Bank & Trust Company, this plaintiff was compelled to execute, and did execute, with said G. W. Shute, a renewal note for the balance of the principal and interest due on said indebtedness to said Gila Valley Bank & Trust Company, represented by said note dated December 30, 1920, as aforesaid, by the terms of which renewal note defendant and his plaintiff promised to pay the sum of Nineteen Thousand Nine Hundred Seventy-eight and 70/100 Dollars ($19,978.70) to said Gila Valley Bank & Trust Company on demand, with interest at the rate of eight per cent per annum thereon, payable on demand, said renewal note being

signed, "G. W. Shute, J. J. Mackay"; that thereafter said defendant, G. W. Shute, defaulted in the payment of the principal and interest due on said last named note after demand for the payment thereof made upon him by said Gila Valley Bank & Trust Company, and that said Gila Valley Bank & Trust Company thereafter demanded the payment by this plaintiff of all the principal and interest due and unpaid upon said indebtedness, for the payment of which plaintiff became [160] surety on the 9th day of February, 1918, as aforesaid, and then represented by said note executed on the 2d day of July, 1921, as aforesaid; that this plaintiff requested said defendant, Shute, to make payment of the said amount of principal and interest due on said indebtedness to said Gila Valley Bank & Trust Company, but that defendant failed, neglected and refused to pay the same, and that plaintiff was compelled to pay, and did pay, for the use of the defendant, G. W. Shute, to said Gila Valley Bank & Trust Company and to its successor in interest as holder of said note, the Valley Bank, between the 13th day of December, 1922, and the 16th day of June, 1927, the sum of Twenty-six Thousand Eight Hundred Thirty-nine and 67/100 Dollars ($26,839.67) for principal and interest due upon said indebtedness represented by said promissory note dated July 2, 1921; that plaintiff has been compelled to pay and has paid to the Gila Valley Bank & Trust Company and the Valley Bank for the use of defendant, by reason of plaintiff becoming surety for the payment of said

amount of Twenty Thousand Dollars ($20,000.00) by said defendant, G. W. Shute, to the Gila Valley Bank & Trust Company, on the 9th day of February, 1918, as aforesaid, the sum of Thirty-one Thousand Three Hundred Thirty-two and 01/100 Dollars ($31,332.01); that said sum of Thirty-one Thousand Three Hundred Thirty-two and 01/100 Dollars ($31,332.01) was paid by this plaintiff to the Gila Valley Bank & Trust Company at Globe, Arizona, and to its successor in interest, The Valley Bank, wholly for the use of said defendant, G. W. Shute, on account of the indebtedness represented by said note hereinabove described, executed on the 9th day of February, 1918, for the principal sum of Twenty Thousand Dollars ($20,000.00).

III.

That no part of said amount of Thirty-one Thousand Three Hundred Thirty-two and 01/100 Dollars ($31,332.01) so paid by plaintiff to the Gila Valley Bank & Trust Company and the [161] Valley Bank for the use of defendant as aforesaid has been paid to the plaintiff, although plaintiff has often requested the payment thereof by the defendant.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of Thirty-one Thousand Three Hundred Thirty-two and 01/100 ($31,332.01), and for his costs of suit herein expended.

ALICE M. BIRDSALL,
Attorney for Plaintiff.

State of Arizona,
County of Maricopa,—ss.

J. J. Mackay, being first duly sworn on oath, deposes and says:

That he is the plaintiff in the foregoing complaint; that he has read said complaint and knows the contents thereof, and that the same is true in substance in fact of his own knowledge, except as to those matters therein stated upon information and belief, and as to such matters he believes it to be true.

J. J. MACKAY.

Subscribed and sworn to before me, Bess M. White, a Notary Public in and for the County of Maricopa, State of Arizona, this 31st day *or* March, 1928.

[Notarial Seal] BESS M. WHITE,
Notary Public.

My commission expires June 18, 1921.

United States of America,
District of Arizona,—ss.

In the United States District Court in and for Said District, Arizona Division. [162]

No. —— IN BANKRUPTCY.

In the Matter of G. W. SHUTE, Bankrupt.

PROOF OF CLAIM.

United States of America,
District of Arizona,
State of Arizona,
County of Maricopa,—ss.

At Phoenix, in said District and State on the 30th day of April, A. D. 1928, came J. J. Mackay of Phoenix, in the County of Maricopa, and State of Arizona, and made oath and says:

That the above-named bankrupt, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and is still justly and truly indebted to J. J. Mackay in the sum of Thirty-one Thousand Three Hundred Forty-three and 81/100 Dollars, with interest from April 30, 1928, at six per cent per annum; that the nature and consideration of said debt is as follows: Money paid for the use of G. W. Shute as more fully appears by copy of complaint hereto attached and made part hereof.

That no part of said debt has been paid, that there are no setoffs or counterclaims to the same. That the only securities held by said None for said debt are the following: ————.

That claimant has not, nor has any person by his order, or to the knowledge or belief of said deponent, for claimant's use, had or received any manner of security for said debt whatever. That no judgment has been rendered on said debt nor has any note been received for such account.

J. J. MACKAY.

Subscribed and sworn to before me this 30th day of April, A. D. 1928.

[Seal] BESS M. WHITE,
(Notary Public.)

My commission expires June 18, 1931.

Filed Apr. 30, 1928. [163]

R. W. SMITH,
Referee.

This claim allowed for the sum of $31343.81 this 16th day of Nov., 1928.

R. W. SMITH,
Referee.

(Back)

(POWER OF ATTORNEY attached to Alice M. Birdsall and sworn to by J. J. Mackay April 30, 1928, before Bess M. White, Notary Public, Maricopa County, Arizona.)

(Formal endorsement on back of claim not copied here.)

(Attached to claim are three promissory notes as follows:)

Globe, Arizona, July 2d, 1921.

No. ————.

Due on demand.

On demand ——— after date, for value received, I promise to pay to The Gila Valley Bank & Trust Company, or its order, Nineteen Thousand Nine Hundred Seventy-eight and 70/100 Dollars, $19,-978.70, at its banking house in Globe, Arizona, with interest thereon at the rate of eight per cent per annum from *annum* until paid, interest payable on demand. If default be made in the payment of interest when due, this note, principal and interest, shall at once thereupon, at the option of the holder, become due and payable, without notice to or demand upon the makers, endorsers or guarantors, or any of them. If this note be placed in the hands of an attorney for collection, then the makers and endorsers hereof agree to pay in addition to the principal and interest due hereon, an amount as attorney's fees equal to ten per cent of the principal and interest then due on this note. The makers and endorsers of this note severally waive presentment [164] hereof for payment, protest and notice of nonpayment and of protest.

P. O. Miami, Arizona.

G. W. SHUTE,
J. J. MACKAY.

(Back)

June 30, 1927.

In consideration of the agreement of J. J. Mackay to forego bringing suit against me for payments made by him upon indebtedness represented by this note until on or after October 1, 1927, I hereby waive the statute of limitations hereon, and agree that in the event said Mackay brings suit against me thereafter, and within a period of two years from October 1, 1927, I will not plead the statute of limitations as a defense to said suit.

G. W. SHUTE.

(Stamp)
No. 28133.
In Evidence.
Plaintiff's Exhibit No. C.
Filed May 21, 1928.
Walter S. Wilson, Clerk.
By M. M. Hill, Deputy.

No. ———, Globe, Arizona, December 30th, 1920.

$19650.95.

On demand after date, for value received, I promise to pay to the order of THE GILA VALLEY BANK & TRUST COMPANY Nineteen Thousand Six Hundred Fifty and 95/100 Dollars, at its banking office in Globe, Arizona, with interest thereon at the rate of 8 per cent per annum from date until paid, interest payable on demand.

If default be made in the payment of interest when due, this note, principal and interest, shall

at once thereupon, [165] at the option of the holder, become due and payable without notice to or demand upon the makers, endorsers, guarantors, or any of them. If this note be placed in the hands of an attorney after maturity or default, for collection, then the makers and endorsers hereof agree to pay in addition to the principal and interest due hereon, an amount as attorney's fees equal to ten per cent of the principal and interest then due on this note. The makers and endorsers of this note severally waive presentment thereof for payment, protest and notice of nonpayment and of protest.

P. O. ———.

G. W. SHUTE.
J. J. MACKAY.

(Here follows ordinary bank form of pledge of security for payment of note of Certificate No. C.464 for 1000 shares Iron Cap Stock, signed

G. W. SHUTE.
J. J. MACKAY.)

(STAMP)
No. 28133.
In Evidence.
Plaintiff's Exhibit No. B.
Filed May 21, 1928.
Walter S. Wilson, Clerk.
By M. M. Hill, Deputy.

Uo. 5831. Globe, Arizona, February 9th, 1918.

$20000.00.

On demand after date, for value received, I promise to pay to the order of THE GILA VALLEY BANK & TRUST COMPANY Twenty

Thousand and no/100 Dollars, at its banking office in Globe, Arizona, [166] with interest thereon at the rate of —— per cent per annum from date until paid, interest payable on demand.

If default be made in the payment of interest when due, this note, principal and interest, shall at once thereupon, at the option of the holder, become due and payable without notice to or demand upon the makers, endorsers, guarantors, or any of them. If this note be placed in the hands of an attorney after maturity or default, for collection, then the makers and endorsers hereof agree to pay in addition to the principal and interest due hereon, an amount as attorney's fees equal to ten per cent of the principal and interest then due on this note. The makers and endorsers of this note severally waive presentment thereof for payment protest and notice of non-payment and of protest.

P. O. ———.

G. W. SHUTE.
J. J. MACKAY.

I have deposited with the above-named payee and pledged the same for the security of the payment of this note, the following: Certificates No. C319: C318: C317: C316: C315: C314: C313: C312: C311

100 shares each.

Iron Cap Copper Co.

Certificate #C464 issued in lieu of above.

(Here follows ordinary bank form of pledge of security for payment of note, signed.

G. W. SHUTE.
J. J. MACKAY.)

(Back)

($4.00 in U. S. Internal Revenue stamps affixed, with the following stamped on each stamp: "Gila Valley Bank & Trust Co. Feb. 16, 1918. Globe, Arizona.") [167]

It was thereupon stipulated by the attorneys that the trustee had been duly authorized by a meeting of creditors to appear in objection to the discharge.

Creditor's Exhibit No. 2 follows: [168]

CREDITOR'S EXHIBIT No. 2.

N. B.—"Debts" shall include any debt, demand or claim provable in bankruptcy. Sec. 1[11]

N. B.—"Creditor" shall include anyone who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy. Sec. 1[9.]

SCHEDULE A.

STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of All Creditors Who Are to be Paid in Full or to Whom Priority is Secured by Law.

CLAIMS WHICH HAVE PRIORITY

Amount

erence to Ledger or Voucher.— Names of Creditors. — Residence if unknown, that act to be stated.) Where and when ontracted. — Nature and consideration of the ebt, and whether contracted as a artner or joint ontractor; and if o, with whom.

[1] Taxes and debts due and owing to the United States.

NONE

Reference to Ledger or Voucher.— Names of Creditors. — Residence (if unknown, that fact to be stated.) Where and when contracted. — Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

Amount

[2.] Taxes due and owing to the state of Arizona or to any county, district or municipality thereof.

State and County taxes on property located in Globe, Gila County, Arizona more particularly described in Schedule B (1) on page 7 hereof. Said taxes being payable to the Treasurer, Gila County, Globe, Arizona, approx. 45 0

Reference to Ledger or Voucher.— Names of Creditors. — Residence (if unknown, that fact to be stated.) Where and when contracted. — Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

[3.] Wages due workmen, clerks or servants to an amount not exceeding $300.00 each, earned within three months before filing this petition.

NONE

Reference to Ledger or Voucher. — Names of Creditors. — Residence (if unknown, that fact to be stated.) Where and when contracted. — Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

[4.] Other debts having priority by law.

NONE

Total 45 0

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [169]

SCHEDULE A. (2)

CREDITORS HOLDING SECURITIES.

(N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Acts of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher.—Names of creditors. — Residence (if unknown, that fact must be stated). — Description of securities. When and where debts were contracted.—Value of securities.	Amou of Deb
NONE	

Total.....

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [170]

SUGGESTION
(In filing this blank, be careful to strictly follow form which requires a statement as to "nature and consideration of debt; and whether any judgment," etc.)

SCHEDULE A. (3)

CREDITORS WHOSE CLAIMS ARE UNSECURED.

(N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to Ledger or Voucher.—Names of creditors.—Residence (if unknown, that fact must be stated).—When and where contracted. — Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and if so, with whom.

Amou

J. J. Mackay, Care Alice Birdsall, Fleming Building, Phoenix, Arizona ..... 31,332 (

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

Total.....$31,332 (

GEO. W. SHUTE,
Petitioner. [171]

SCHEDULE A. (4)

LIABILITIES ON NOTES OR BILLS DISCOUNTED WHICH OUGHT TO BE PAID BY THE DRAWERS, MAKERS, ACCEPTORS OR INDORSERS.

(N. B.—The dates of the notes or bills, and when due, with the names, residences and the business or occupation of the drawers, makers, acceptors or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.)

Reference to Ledger or Voucher.—Names of holders so far as known.—Residence (if unknown, that fact must be stated).—Place where contracted. — Nature of liability, and whether same was contracted as partner or joint contractor or with any other person; and if so, with whom.	Amount
	NONE
	Total.....

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [172]

(SCHEDULE A. 5.)

ACCOMMODATION PAPER.

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the bankrupt be liable as a drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. State particulars as to other commercial paper.

Reference to Ledger or Voucher.—Names of holders.—Residence (if unknown, that fact must be stated).—Names and residences of persons accommodated.—Place where contracted—Whether liability was contracted as partner or joint contractor, or with any other person; and if so, with whom.	Amount.
NONE	
Total.....	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [173]

OATH TO SCHEDULE A.

United States of America,
District of Arizona,—ss.

On this 17th day of April, A. D. 1928, before me personally came George W. Shute, the person mentioned in and who subscribed to the foregoing Schedule, and who being by me first duly sworn, did declare the said Schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to Bankruptcy.

GEO. W. SHUTE.

Subscribed and sworn to, before me, this 17th day of April, 1928.

[Seal] R. E. CONGER,
Notary Public.

My commission expires Jan. 15, 1931.
(This Oath to Follow Schedule A–5.) [174]

SCHEDULE B.

STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1).

REAL ESTATE.

Location and description of all real estate owned by debtor, or held by him. Incumbrances thereon, if any, and dates thereof. Statement of particulars relating thereto.

Estimated Value

All and singular that certain piece or parcel of land lying and being in Block No. 5 of Globe Townsite, and more particularly described as follows, to wit: Beginning at the Northwest corner of Block No. 5; running thence Easterly along the Northern boundary of said Block, 75 feet more or less to the Northeast corner of said Block: thence southerly along the Townsite line 98.9 feet more or less to the land sold to W. D. Fisk; thence westerly along the Northern line of said Fisk's land 75 feet more or less to the Western boundary line of said Block; thence Northern along said Western boundary of Block, 98.9 feet more or less to place of beginning, containing about 7417.5 feet or 2.34 lots.....$250 00

Taxes due on this property as set forth in Schedule A (1) in the amount of approximately $45.

Total.....$250 00

GEO. W. SHUTE,
Petitioner. [175]

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

SCHEDULE B. (2).

PERSONAL PROPERTY.

		Dollars	Cents
A. Cash on hand.	NONE		
B. Bills of exchange, promissory notes, or securities of any description (each to be set out separately).	NONE		
C. Stock in trade in ..... business of ..... at ..... of the value of	NONE		
D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz:	Household, table and kitchen furniture, including furniture, rugs, carpets, wearing apparel, bedding and bedsteads, etc....	$250	00
E. Books, prints and pictures, viz:	Hanging pictures and family library	25	00
F. Horses, cows, sheep and other animals (with number of each), viz:	NONE		
G. Carriages and other vehicles, viz:	NONE		

	Dollars	Cents
H. Farming stock and implements of husbandry, viz:	NONE	
I. Shipping and shares in vessels, viz:	NONE	
K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz:	NONE	
L. Patent, copyrights and trade-marks, viz:	NONE.	
M. Goods or personal property of any other description, with the place where each is situated, viz:	Law library including Cyc., Corpus Juris, Arizona Reports, Words and Phrases, Min. Reports to N. W., American Law Reports, Desk and filing case..	$750.00

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [176]

SCHEDULE B. (3).

CHOSES IN ACTION.

		Dollars Cents
A. Debts due petitioner on open account.	NONE	
B. Stock in incorporated companies, interest in joint stock companies, and negotiable bonds.	Greenback Mining Company, Certs. No. 1552 to 1556 inclusive for 2500 shares of the par value of $1.00	no mkt.
	Arizona Associated Mines Company, Cert. No. 10 for 1250 shares of the par value of 10¢	no mkt.
	California Carbon Company, Cert. No. 18 for 1 share of the par value of $100.	no mkt.
C. Policies of Insurance.	NONE	
D. Unliquidated claims of every nature, with their estimated value.	NONE	
E. Deposits of money in banking institutions and elsewhere.	Deposit First National Bank of Arizona at Phoenix.	$15 67
	Total	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [177]

SCHEDULE B. (4).

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, INCLUDING PROPERTY HELD IN TRUST FOR THE DEBTOR, OR SUBJECT TO ANY POWER OR RIGHT TO DISPOSE OF OR TO CHARGE.

(N. B.—A particular description of each interest must be entered. If all, or any of the debtor's property has been conveyed by deed or assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as it is known to the debtor.)

General Interest.	Particular Description.	Supposed Value of My Interest Dollars Cents
Interest in land.	NONE	
Personal Property.	NONE	
Property in money, stock, shares, bonds, annuities, etc.	NONE	
Rights and powers, legacies and bequests.	NONE	
	Total.....	

		Amount realized from proceeds of property Conveyed
Property heretofore conveyed for the benefit of creditors.	NONE	

	Dollars	Cents
What portion of debtor's property has been conveyed by deed or assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.	NONE	
What sum or sums have been paid to counsel and to whom, for services rendered or to be rendered in this bankruptcy.	Orme Lewis, Phoenix, Arizona	$100 00
	Total	$100 00

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [178]

SCHEDULE B. (5).

A particular statement of the property claimed as exempted from the operation of the Acts of Congress relating to Bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description and present use.

Military uniform, arms and equipments.

	Valuation Dollars	Cents
NONE		

Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.

Household, table and kitchen furniture including furniture, rugs, carpets, wearing apparel, bedding and bedsteads, etc.	$250	00
Hanging pictures and family library	25	00
Law library including Cyc., Corpus Juris, Arizona Reports, Words and Phrases, Minn. Reports to N. W., American Law Reports, Desk and filing case	750	00
Revised Statutes of Arizona 1913, Civil Code, paragraph No. 3302, page 1113.		

N. B.—This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force

at the time of the filing of the petition in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition.

Total.....$1,025 00

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [179]

SCHEDULE No. B. (6).

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books. NONE

Deeds. NONE

Papers. NONE

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [180]

OATH TO SCHEDULE B.

United States of America,
District of Arizona,—ss.

On this 17th day of April, A. D. 1928, before me personally came George W. Shute, the person mentioned in and who subscribed to the foregoing Schedule and who being by me first duly sworn, did declare the said Schedule to be a statement of all his estate, both real and personal, in accordance with the Acts of Congress relating to Bankruptcy.

GEO. W. SHUTE.

Subscribed and sworn to, before me, this 17th day of April, 1928.

[Seal] R. E. CONGER,
Notary Public.

My commission expires Jan. 15, 1931. [181]

SUMMARY OF DEBTS AND ASSETS.

From the Statements of the Bankrupt in Schedules A and B.

		Dollars.	Cents.
Schedule A.	1. (1) Taxes and debts due the United States.		
	1. (2) Taxes due States, Counties, Districts and Municipalities.	45	00
	1. (3) Wages		
	1. (4) Other debts preferred by law.....		

Schedule A.	2. Secured claims		
Schedule A.	3. Unsecured claims.....	31,332	01
Schedule A.	4. Notes and bills which ought to be paid by other parties thereto ..		
Schedule A.	5. Accommodation paper...		
	Schedule A, Total...	$31,377	01
Schedule B.	1. Real Estate	250	00
Schedule B.	2. a. Cash on hand.....		
	2. b. Bills, promissory notes, and securities		
	2. c. Stock in trade.....		
	2. d. Household goods, etc..	250	00
	2. e. Books, prints and pictures	25	00
	2. f. Horses, cows and other animals		
	2. g. Carriages and other vehicles		
	2. h. Farming stock and implements		
	2. i. Shipping and shares in vessels		
	2. k. Machinery, tools, etc...		
	2. l. Patents, copyrights and trade-marks ..		
	2. m. Other personal property	750	00

Schedule B.	3. a. Debts due on open accounts	
	3. b. Stocks, negotiable bonds, etc.	
	3. c. Policies of insurance..	
	3. d. Unliquidated claims..	
	3. e. Deposits of money in banks and elsewhere....	15 67
Schedule B.	4. Property in reversion, remainder, trust, etc...	
Schedule B.	5. Property claimed to be exempt $1,025.00	
Schedule B.	6. Books, deeds and papers.	

Schedule B, Total..... $1290 67

(N. B.—This summary Blank must be filled out and properly footed.)

GEO. W. SHUTE,
Petitioner. [182]

Creditor's Exhibit No. 2 is marked "Filed in the United States District Court for the District of Arizona on April 17, 1928, and filed April 18, 1928, by R. W. Smith, Referee."

Thereupon referee's order directing bankrupt to file amended schedule was admitted in evidence and read into the record as follows:

(Omitting title of court and cause and endorsements.)

"Upon motion of Alice M. Birdsall, attorney for J. J. Mackay, a creditor of said estate, that said bankrupt be required and ordered to amend his

schedules theretofore filed in said matter, upon the ground that the testimony of said bankrupt, given under examination by said attorney, disclosed that said schedules were incorrect and untrue.

IT IS ORDERED by the referee that said bankrupt be and he is hereby required to file new schedules or to so amend said schedules theretofore filed by him to conform to the facts and the provisions of the bankrupt act.

Dated this 1st day of May, 1928.

R. W. SMITH,

Referee in Bankruptcy."

Creditor's Exhibit No. 3 was then admitted in evidence, as follows: [183]

CREDITOR'S EXHIBIT No. 3.

N. B.—"Debts" shall include any debt, demand or claim provable in bankruptcy. Sec. 1 [11]

N. B.—"Creditor" shall include anyone who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy. Sec. 1 [9.]

AMENDED SCHEDULE A.

B–486—Prct.

STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of All Creditors Who are to be Paid in Full or to Whom Priority is Secured by Law.

CLAIMS WHICH HAVE PRIORITY

Amount

Reference to Ledger or Voucher.— Names of Creditors. — Residence (if unknown, that fact to be stated.) Where and when contracted. — Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

[1.] Taxes and debts due and owing to the United States.

NONE

Reference to Ledger or Voucher.— Names of Creditors. — Residence (if unknown, that fact to be stated.) Where and when contracted. — Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

[2.] Taxes due and owing to the state of Arizona or to any county, district or municipality thereof.

State and County taxes on property located in Globe, Gila County, Arizona, more particularly described in Schedule B. (1) on page 7 hereof. Said taxes being payable to the Treasurer, Gila County, Globe Arizona, approx. $45 00

Amount

[3.] Wages due workmen, clerks or servants to an amount not exceeding $300.00 each, earned within three months before filing this petition.

Reference to Ledger or Voucher. — Names of Creditors. — Residence (if unknown, that fact to be stated). Where and when contracted. — Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

NONE

[4.] Other debts having priority by law.

Reference to Ledger or Voucher. — Names of Creditors. — Residence (if unknown, that fact to be stated.) Where and when contracted. — Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

NONE

Total.....$45 00

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [184]

SCHEDULE A. (2)

CREDITORS HOLDING SECURITIES.

(N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Acts of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher.—Names of creditors.—Residence (if unknown, that fact must be stated.)—Description of securities. — When and where debts were contracted.—Value of securities.	Amount of Debts
Promissory note payable to the First National Bank of Arizona at Phoenix, dated April 7, 1928, interest 8%, payable 90 days after date and secured by a chattel mortgage on a Hudson automobile subject to a conditional sales contract with A. E. England, 424 North Central Avenue, Phoenix, Arizona, in whose possession said security may be found. Said debt being contracted at Phoenix, Arizona, by your petitioner herein.	
Value of said security	$750 00
Total.....	$750 00

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [185]

SUGGESTION

(In filing this blank, be careful to strictly follow form which requires a statement as to "nature and consideration of debt; and whether any judgment," etc.)

SCHEDULE A. (3)

CREDITORS WHOSE CLAIMS ARE UNSECURED.

(N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to Ledger or Voucher. — Names of creditors.—Residence (if unknown, that fact must be stated).—When and where contracted. — Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and if so, with whom.

Amount

J. J. Mackay, $31,332 01

County of Maricopa, State of Arizona. Care Alice Birdsall, Fleming Building, Phoenix, Arizona.

The nature and consideration of said indebtedness is as follows: Promissory note dated Globe, Arizona, February 9, 1918, for $20,000, payable to the Gila Valley Bank & Trust Company and signed by G. W. Shute as principal and J. J. Mackay as surety and upon which the said J. J. Mackay paid interest in the amount of

Amount

$3,706.34 between the 30th day of December, 1918 and the 30th day of December, 1920.

Renewal note dated Globe, Arizona, December 30, 1920, for $19,650.95 payable to the Gila Valley Bank & Trust Company and signed by G. W. Shute as principal and J. J. Mackay as surety and upon which the said J. J. Mackay paid interest in the amount of $786.

Renewal note dated Globe, Arizona, January 2, 1921, for $19,978.70 payable to the Gila Valley Bank & Trust Company and signed by G. W. Shute as principal and J. J. Mackay as surety and upon which the said J. J. Mackay paid principal and interest in the amount of $26,839.67 between the 13th day of December, 1922, and the 16th day of June, 1927.

Total.....$31,332 01

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [186]

SCHEDULE A. (4)

LIABILITIES ON NOTES OR BILLS DISCOUNTED WHICH OUGHT TO BE PAID BY THE DRAWERS, MAKERS, ACCEPTORS OR INDORSERS.

(N. B.—The dates of the notes or bills, and when due, with the names, residences and the business or occupation of the drawers, makers, acceptors or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.)

Reference to Ledger or Voucher. — Names of holders so far as known.— Residence (if unknown, that fact must be stated).— Place where contracted. — Nature of liability, and whether same was contracted as partner or joint contractor or with any other person; and if so, with whom.	Amount
	NONE
Total.....	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [187]

(SCHEDULE A. 5)

ACCOMMODATION PAPER.

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the bankrupt be liable as a drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. State particulars as to other commercial paper.)

Reference to Ledger or Voucher. — Names of holders. —Residence (if unknown, that fact must be stated).— Names and residences of persons accommodated. — Place where contracted. — Whether liability was contracted as partner or joint contractor, or with any other person; and if so, with whom.	Amount
NONE	
Total.....	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [188]

OATH TO SCHEDULE A.

United States of America,
District of Arizona,—ss.

On the 7th day of May, A. D. 1928, before me personally came George W. Shute, the person mentioned in and who subscribed to the foregoing Schedule, and who being by me first duly sworn, did declare the said Schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to Bankruptcy.

GEO. W. SHUTE,

Subscribed and sworn to, before me, this 7th day of May, 1928.

[Seal] R. E. CONGER,
Notary Public.

My commission expires Jan. 15, 1931.

(This oath to follow Schedule A.–5.) [189]

SCHEDULE B.

STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

REAL ESTATE.

Location and description of all real estate owned by debtor, or held by him. Incumbrances thereon, if any, and dates thereof. Statement of particulars relating thereto.	ESTIMATED VALUE.
All and singular that certain piece or parcel of land lying and being in Block No. 5 of Globe Townsite, and more particularly described as follows, to wit: Beginning at the North west corner of Block No. 5; running thence Easterly along Northern boundary of said Block, 75 feet more or less to the Northeast corner of said Block; thence southerly along the Townsite line 98.9 feet more or less to the land sold to W. D. Fisk; thence westerly along the Northern line of said Fisk's land 75 feet more or less to the Westerly boundary line of said Block; thence Northern along said Western boundary of Block, 98.9 feet more or less to place of beginning, containing about 7417.5 feet or 2.34 lots	$250 00

Estimated Value.

Incumbrances:

Taxes due on this property as set forth in Schedule A (1) in the amount of approximately $45.

Total.....$250 00

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [190]

SCHEDULE B. (2)

PERSONAL PROPERTY.

		Dollars	Cents
A. Cash on hand.	NONE		
B. Bills of exchange, promissory notes, or securities of any description (each to be set out separately).	NONE		
C. Stock in trade in ..... business of ..... at ..... of the value of	NONE		
D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz:	Household, table and kitchen furniture, including furniture, rugs, carpets, wearing apparel, bedding and bedsteads etc.	$250	00
E. Books, prints and pictures, viz:	Hanging pictures and family library	25	00
F. Horses, cows, sheep and other animals (with number of each), viz:	NONE.		

		Dollars	Cents
G. Carriages and other vehicles, viz:	NONE		
H. Farming stock and implements of husbandry, viz:	NONE		
I. Shipping and shares in vessels, viz:	NONE		
K. Machinery, fixtures, apparatus and tools used in business with the place where each is situated, viz:	NONE		
L. Patent, copyrights and trade-marks, viz:	NONE		
M. Goods or personal property of any other description, with the place where each is situated, viz:	Law library of Cyc, Corpus Juris, Arizona Reports, Words & Phrases, Minn. Reports to N. W., American Law Reports, Desk and file case	$750	00
	20% interest in office equipment of Armstrong, Lewis & Kramer, F. N. B. A. Bldg., Phoenix, Ariz.	769	15

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [191]

SCHEDULE B. (3)
CHOSES IN ACTION.

		Dollars	Cents
A. Debts due petitioner on open account.	25% interest in the net earnings of Armstrong, Lewis & Kramer made and earned as shown on the books of said firm from the 1st day of April, 1927, subject to the agreement as of that date. The value of this interest is determinable only as the accounts so made and earned are collected.		
B. Stock in incorporated companies, interest in joint stock companies, and negotiable bonds.	Greenback Mining Company Certs. No. 1552 to 1556 inclusive for 2500 shares of the par value of $1. .....No mkt.		
	Arizona Associated Mines Company Cert. No. 10 for 1250 shares of the par value of 10¢ No mkt.		
	California Carbon Company Cert. No. 18 for 1 share of the par value of $1 .....No mkt.		
	New Dominion Copper Co. Cert. No. 2408 for 744 shares of the par value of $1 .....No mkt.		
C. Policies of Insurance.	NONE		
D. Unliquidated claims of every nature, with their estimated value.	NONE		

		Dollars	Cents
E. Deposits of money in banking institutions and elsewhere.	Deposit First National Bank of Arizona at Phoenix	$ 15	67
	Total.....	$ 15	67

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [192]

SCHEDULE B. (4)

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, INCLUDING PROPERTY HELD IN TRUST FOR THE DEBTOR, OR SUBJECT TO ANY POWER OR RIGHT TO DISPOSE OF OR TO CHARGE.

(N. B.—A particular description of each interest must be entered. If all, or any of the debtor's property has been conveyed by deed or assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as it is known to the debtor.)

General Interest.	Particular Description	Supposed Value of My Interest Dollars	Cents
Interest in land.	NONE		
Personal Property.	NONE		
Property in money, stocks, shares, bonds, annuities, etc.	NONE		
Rights and powers, legacies and bequests.	NONE		
	Total.....		

		Dollars Cents Amount realized from proceeds of property Conveyed
Property heretofore conveyed for the benefit of creditors.	NONE	
What portion of debtor's property has been conveyed by deed or assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.	NONE	
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.	Orme Lewis Phoenix, Arizona $100 00	
	Total.....$100 00	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [193]

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the Act of Congress relating to Bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description and present use.

		Valuation Dollars Cents
Military uniform, arms and equipments.	NONE.	
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to	Household, table and kitchen furniture including furniture, rugs, carpets, wearing apparel, bedding and	

	Dollars	Cents
bedsteads, etc.	$ 250	00
Hanging pictures and family library	25	00
Law library of Cyc, Corpus Juris, Arizona Reports, Words and Phrases, Minn. Reports to N. W., American Law Reports, Desk and file case	750	00
20% interest in office equipment of Armstrong, Lewis & Kramer, F. N. B. A. Bldg., Phoenix, Arizona	769	15

the statute of the State creating the exemption.

N. B.—This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filng of the petition in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition.

The above being the professional library and necessary office furniture of your petitioner.

Revised Statutes of Arizona, 1913 Civil Code, paragraph No. 3302, page 1113.

Total..... $1,794 15

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

GEO. W. SHUTE,
Petitioner. [194]

SCHEDULE No. B. (6)

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books. NONE

Deeds. NONE

Papers. Books of income, showing income in full are kept by the firm of Armstrong, Lewis & Kramer, a partnership, and are in the possession of said partnership. Books of the First National Bank of Arizona show deposits. My cancelled checks, together with stubs, will show expenditures, and partnership agreements will show relation to the partnership.

GEO. W. SHUTE,
Petitioner. [195]

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

OATH TO SCHEDULE B.

United States of America,
District of Arizona,—ss.

On this 7th day of May, A. D. 1928, before me personally came George W. Shute, the person mentioned in and who subscribed to the foregoing Schedule and who being by me first duly sworn, did declare the said Schedule to be a statement of all his estate, both real and personal, in accordance with the Acts of Congress relating to Bankruptcy.

GEO. W. SHUTE.

Subscribed and sworn to before me, this 7th day of May, 1928.

[Seal] R. E. CONGER,
Notary Public.

My Commission expires Jan. 15, 1931. [196]

SUMMARY OF DEBTS AND ASSETS.

From the Statements of the Bankrupt in Schedules A and B.

		Dollars	Cents
Schedule A.	1. (1) Taxes and debts due the United States		
	1. (2) Taxes due States, Counties, Districts and Municipalities	$ 45	00
	1. (3) Wages		
	1. (4) Other debts preferred by law...		
Schedule A.	2. Secured claims	750	00
Schedule A.	3. Unsecured claims	31,332	01
Schedule A.	4. Notes and bills which ought to be paid by other parties thereto		
Schedule A.	5. Accommodation paper		
	Schedule A, Total...	$32,127	01
Schedule B.	1. Real Estate	$ 250	00
Schedule B.	2. a. Cash on hand.....		
	2. b. Bills, promissory notes, and securities		
	2. c. Stock in trade		
	2. d. Household goods, etc.	250	00
	2. e. Books, prints and pictures	25	00
	2. f. Horses, cows and other animals.....		

		Dollars	Cents
	2. g. Carriages and other vehicles		
	2. h. Farming stock and implements		
	2. i. Shipping and shares in vessels		
	2. k. Machinery, tools, etc.		
	2. l. Patents, copyrights and trade-marks ..		
	2. m. Other personal property	750	00
Schedule B.	3. a. Debts due on open accounts		
	3. b. Stocks, negotiable bonds, etc.		
	3. c. Policies of insurance		
	3. d. Unliquidated claims		
	3. e. Deposits of money in banks and elsewhere	15	67
Schedule B.	4. Property in reversion, remainder, trust, etc.		
Schedule B.	5. Property claimed to be exempt ... $1,794.15		
Schedule B.	6. Books, deeds and papers		

Schedule B, Total.. $ 2,059 82

GEO. W. SHUTE,
Petitioner. [197]

(N. B.—This summary Blank must be filed out and properly footed.)

(Testimony of Otis E. Rogers, Jr.)

Creditor's Exhibit No. 3 is endorsed "Filed May 8, 1928, in the office of the Clerk of the District Court of the United States in and for the District of Arizona."

TESTIMONY OF OTIS E. ROKERS, Jr.

(Examination by Mr. NEALON.)

My name is Otis E. Rogers, Jr. I am chief deputy of the County Recorder's Office. I have in my possession a conditional sales contract between A. E. England Motor Company and George W. Shute or G. W. Shute. Date of record is November 26, 1927. This instrument is duly recorded in our office.

Whereupon conditional sales contract referred to was admitted in evidence as Creditor's Exhibit No. 4, the same being conditional contract of sale entered into in quadruplicate November 25, 1927, between A. E. England Motors, Inc., referred to as the seller, and G. W. Shute of Phoenix, Arizona, referred to as the purchaser, the same covering property described as 1928 Hudson super-six std. sedan, motor No. 495579, Serial No. 799342, payment of $1500.00 being due thereunder on the 25th day of November, 1928, and being the only payment listed under schedule of payments. Said instrument is signed by A. E. England Motors, Inc., by E. A. Wedepohl, title Secretary, and by G. W. Shute as purchaser. It is endorsed "Filed and

(Testimony of Otis E. Rogers, Jr.)
recorded at the request of A. E. England Motors, Inc., on Nov. 26, 1927."

Thereupon chattel mortgage was produced by witness and admitted in evidence as Creditor's Exhibit No. 5, being a [198] chattel mortgage executed by G. W. Shute as mortgagor to the First National Bank of Arizona at Phoenix as mortgagee for the sum of $750.00 and covering the following described personal property with the following recitation therein "One Hudson std. sedan, engine No. 495579, Serial No. 799342, model No. 1928, registration No. 101759, all of which property is hereby warranted to be the property of the said mortgagor in his possession and free from all prior liens, claims and incumbrances whatsoever." Said mortgage contains usual clauses and recites it is given to secure one promissory note executed by G. W. Shute, the mortgagor, payable to the First National Bank of Arizona at Phoenix, the mortgagee, for the sum of $750.00, dated April 7, 1928, due July 7, 1928, with interest at 8% per annum from date until paid. Recites if bankruptcy proceedings be instituted by or against the mortgagor, or if the mortgaged property be sold by the mortgagor without the written consent of the mortgagee, then the whole sum secured with interest shall become immediately due and payable at the option of the mortgagee, and that as long as the conditions of the mortgage are fulfilled the mortgagor is to remain in peaceful possession of the property, and in consideration thereof agrees to keep

said property in as good condition as it now is. Said mortgage is dated April 7, 1928, and is signed and acknowledged by G. W. Shute. An affidavit of *bona fides* is made by G. W. Shute as mortgagor and by Sylvan Ganz as vice president of the mortgagee and sworn to by G. W. Shute and Sylvan Ganz before R. E. Conger, notary public, on April 9, 1928. It is endorsed "Recorded at the request of First National Bank of Arizona April 9, 1928."

It was stipulated by counsel for bankrupt that neither of said Exhibits 3 and 4 was released of record.

Thereupon Creditor's Exhibit No. 6 was admitted in evidence as follows: [199]

CREDITOR'S EXHIBIT No. 6.

"Phoenix, Arizona, Nov. 25, 1927, No. 528.

FIRST NATIONAL BANK OF ARIZONA, 91–1.
Phoenix, Arizona.

Pay to the order of A. E. England $250.00 Two Hundred Fifty no/100 Dollars.

G. W. SHUTE.

(End)
G. W. SHUTE
(Back)
Pay to the Order of
The National Bank of Arizona
Phoenix, Arizona
A. E. ENGLAND."

(Testimony of E. A. Wadepohl.)

"(Round Rubber Stamp)"

THE NATIONAL BANK OF ARIZONA

1

NOV. 26, 1927.

$

(Perforated) [200]

TESTIMONY OF E. A. WEDEPOHL, FOR TRUSTEE.

(Given Before the Referee in Bankruptcy on May 29, 1928)

(Examination by Mr. NEALON.)

I brought with me the ledger account of G. W. Shute with A. E. England Motors, incorporated.

(Whereupon it was stipulated by counsel that a true copy of such ledger account was attached to the testimony of the witness taken before the referee and that all of such testimony [201] of witness taken before the referee with exhibits attached should be admitted in evidence, the same being as follows:)

We do not keep other deposit slips showing by whom paid. Our deposits show exactly like this (writing with pencil). The entry on folio 281 of December 13th is just an invoice. When a car comes in it is credited to Stock Account. When it is sold we bill the car on the invoice and charge Accounts Receivable and credit Stock Account. When the car comes into our possession prior to that date we charge the stock account when it comes

(Testimony of E. A. Wedepohl.)

in and credit cash. When the car is sold we credit Stock Account and charge Accounts Receivable or Cash as the case may be. In the transaction like this one on December 11th, showing payment of $400, we did not take any other evidence of indebtedness than our charge account for V. A. Went worth. It is our custom to do so just with established customers. The description of this Hudson car is a four-door Hudson sedan, 1928 model, although it was built in 1927. This ledger sheet I have submitted from our ledger bears no year date. It is 1927, and the January entry is 1928. I know no more about this transaction than is given here. The car was selected by Miss Wentworth. I know the individual who paid the $400. It was paid either by check or draft. Ordinarily, it would be deposited on the day received unless it was paid at four or five o'clock in the afternoon. We made daily deposits. I turn to our cash-book, folio 74, and read into the record the entry of September 14th, 1926, "G. W. Shute." It appears on our book "$100.00." In explanation of that, "Cash credit." There wouldn't be any explanation in our records. It was intended that Mr. Shute's account should be credited. That is a credit, and looking at the ledger account it shows that no charge had been made to Mr. Shute up to that time. After looking at that record, I cannot tell anything more about the $100 than other little items that are going through. It is our practice to [202] charge our supplies on another book and post the entries on

(Testimony of E. A. Wedepohl.)

the tenth. On having my attention called to the first charge to the account of G. W. Shute on September 30, 1926, "transferring contract," which is $6.25, my explanation of that is that it is part of the fee we paid to get transfer of the contract paid for Mr. Shute and charged to his account. The date is September 30th here. That is not the date of the actual payment of the money. We carry these little items in petty cash account and when we get $40 or $50 together we make a charge. Turning to entry of September 30th, folio 5073, that is an invoice. I haven't those with me.

Q. I will call your attention to your entry "C. I. T. payments (3) on September 30," 190 "5."

Mr. ENGLAND.—That was the three payments in arrears. Judge Shute took up that contract and he paid that; it was $61.08 a payment.

Mr. WEDEPOHL resumes: Turning to folio 77, September 18th, that entry reads September 18th, Cash $12.60. I have no explanation. Folio 126, January 22, 1927, reads $19.70. Folio 130, G. W. Shute, $16.50. Turning to journal the item of April 30th, $126.70, folio 121, is a transfer from one account and putting it in another. It was taken from this one and put into this one (indicating). Explaining why we have two accounts covering the same period of time as to Judge Shute, I will say we had one account under the head of "Retail Sales" and the other under "Parts." This $126.70 was transferred to the regular account, and then we closed that other account.

(Testimony of E. A. Wedepohl.)

Reading entry, folio 224, November 30th, $100, G. W. Shute, my explanation is that $100.00 was credited to account. It does not show for what purpose it was paid. Turning to cash-book, folio 10, February 28, 1928, that shows credit $200.00. On February 27th, top of the same [203] page, folio 10, our check No. 3390, $200.00, charged to his account. I don't recall what that was. I would not say that we gave him check for $200 which he paid us back on the 28th. I would like to look at the check. The book indicates that we gave him check No. 3390 for $200, and that he gave us $200 on the 28th. All our books show is that we paid him $200 the day before we received it from him. Turning to page 151, account of G. W. Shute, and looking at the entry of April 11, 1927, folio 151, $436.87, that check was payable to C. I. T. Corporation to pay on contract. I mean by that we gave our check and charged it to this account. The pencil memorandum on this ledger sheet "Pay off old Hudson" is the explanation I refer to. On page 161 there is a charge of $1775.00, Hudson five-passenger std sedan. That is the invoice. I haven't that. That is the retail price of that car. Turning to folio 151, April 4, 1927, credit to G. W. Shute $700.00, I have no explanation of that. It was apparently received from him on that date. Turning to journal 121 and reading into the record, entry of April 30th, $404.47, that is a charge to Discounts and credit to G. W. Shute's account. Explaining that transaction, it was an allowance on

(Testimony of E. A. Wedepohl.)

the price of the five-passenger sedan so that we actually realized $1,775.54 less $404.47. Turning back to cash-book, page 169, that is credit of $2,000.00 to the account of G. W. Shute. It is a receipt by us from Judge Shute of $2,000, and was in 1927. Turning to cash-book, page 171, June 6, 1927, that shows our check No. 2207 issued in favor of Mr. Shute for $765.90. The books show that check was delivered to him at that time. Referring to our journal entry of July 30th, page 149, of $335.00, that is a charge to Judge Shute's credit, to used car purchase. That was an entry that the bookkeeper made. It was just a cross entry. Referring to entry of August 31, 1927, Essex No. 640003, $995.00, that is an invoice for the car. We have no entry for that. It indicates sale of an Essex car to Judge Shute on [204] August 31st. Referring to entry dated November 30, 1927, folio 276, that is an invoice for $1535.00. Referring to entry on May 18th, Essex sedan, $1060.00, that is an invoice. Referring to journal, page 161, entry of $156.47, that is a discount allowance on the Essex car on the same day. Referring to cash-book, folio 197, September 6th, credit to Judge Shute of $250.00, that was cash $250 applied just on his account. The entry of October 6th, folio 207, credit of $100, is just a credit to his account. The entry of October 6th, folio 207, credit $1185.00, is a cash credit to his account. The same folio, October 7th, $100.00, is a cash credit. The entry, November 26th —these are all in 1927—at page 223, credit of

(Testimony of E. A. Wedepohl.)

$250.00, was a cash credit to his account. The journal, folio 23, credit of $400, is for used car taken as a credit on the last Essex car. On the same page a credit of $660.00 is a contract taken on the same car. That is a contract on the last car on which the purchase price was $1060.00. That note has not been paid. It is in possession of our company. There are no credits on it. I am the secretary of this company.

The witness further testified before the Court as follows:

(Examination by Mr. NEALON.)

I don't think I know about this Hudson car of Judge Shute having been in the business place of the England Motors Company prior to April 17, 1928, and subsequent thereto. I don't know whether it was in there or not. I don't know who would have that information. I have no record of any storage of that car at that place. We keep a record of the sales of cars sold by us when they are turned back. Referring to Hudson car motor No. 495579, serial No. 799342, it was not turned back that I know of upon any sales contract to the A. E. England Motors Company. It was resold but it was not turned back that I know of. (Examining [205] document.) We never had anything to do with the resale of that one. I am familiar with the salesroom of our establishment. I have never seen this car on the sales floor. I think I would have seen it if it had been there. I

have not the account of the car sold to Virginia L. Wentworth. [206]

CREDITOR'S EXHIBIT No. ——.

Sheet No. ——.

Rating Credit limit Name—V. L. Wentworth
Business Address—Globe, Arizona.
Account No. ——

Date.	Items.	Fol.	Debits.
1927.			
Dec. 13	Hudson Serial 11306	281	1395 00
		(Pencil)	1395 00

Date.	Items.	Fol.	Credits.
Dec. 11	Cash	227	400 00
Jan. 3	Cash	1	995 00
		(Pencil)	1395 00

This is a copy of original ledger sheet.

A. E. ENGLAND MOTORS, INC.
E. A. WEDEPOHL,
Secretary.

Sheet No. ——.

Rating. Credit limit. Name—G. W. Shute,
Business. Address—Phoenix, Arizona.
Account No. ——.

Date.	Items.	Fol.	Debits.
1927.			
Apr. 11.	Pay off old Hudson	151	436 87
Apr. 15.	Hudson 5–Pass. [207]		

(Date.)	(Items.)	(Fol.)	(Debits.)
(Apr.)			
	std. Sedan		
	Serial 770273		
	Motor 459077	161	1775 00
Apr. 30.	J–Trf to close		
	old acct.	J121	126 70
June 6.	Cash (Refund)	171	765 90
July 30.	J. Dup of 7/6/27	149	335 00
Aug. 31.	Essex Coach		
	Ser. 640003	234	995 00
	Motor		
Oct. 29.	Title	215	1 00
Nov. 30.	Hudson Sedan		
	Serial 799342		
	Motor 495579	276	1535 00
1928			
May 18.	Essex Sedan	417	1060 00
	(Pencil) $14.53	(Pencil)	7030 47

Date.	Items.	Fol.	Credits.
1927.			
Apr. 4.	Cash	151	700 00
30.	J	121	404 47
June 7.	Cash	169	2000 00
July 6.	Used Car	143	335 00
6.	Note	143	90 00
18.	Cash	178	50 00
18.	Cash	178	335 00
Aug. 31.	J	161	156 47
Sept. 6.	Cash	197	250 00
Oct. 6.	Cash	207	100 00

[208]

(Date.)	(Items.)	(Fol.)	(Credits.)
(Oct.) 6.	(Cash)	207	1185 00
(Oct.) 7.	(Cash)	207	100 00
Nov. 26.	(Cash)	223	250 00
1928.			
May 17.	Used Car	23	400 00
May 17.	Notes	23	660 00
		(Pencil)	7015 94

This is a copy of original ledger sheet.

A. E. ENGLAND MOTORS, INC.

E. A. WEDEPOHL,

Secretary.

Sheet No. ——.

Rating Credit Limit.

Name—G. W. Shute.

Business. Address—Phoenix, Arizona.

Date.	Items.	Fol.	Debits.
1926.			
Sept. 30.	Trf. of Contract	80	6 25
Sept. 30.	Tire tube cas & title	5073	43 00
Sept. 30.	C. I. T. Payts (3)		190 05
Sept. 31.	Prestolite Battery	6108	19 70
1927.			
Feb. 10.	Battery	6367	16 50
July 27.	Pts (?)	1375	49 70
Nov. 30.	Tires	2537	50 40
Nov. 30.	Tires	3218	50 40
Nov. 30.	Cash	226	49 60
1928.			
Feb. 13.	Paint Oldsmobile	7614	25 00

[209]

(Date.)	(Items.)	(Fol.)	(Debits.)
Feb. 24.	Tires	7655	
Feb. 27.	Cash	10	2000 00
Mar. 1.	Pts.	4821	41 50
Mar. 12.	Battery	7679	6 50
Mar. 12.	Repaint Rdds (?)	7681	25 00
	(Pencil) $100.10	(Pencil)	824 00
Date.	Items.	Fol.	Credits.
1926.			
Sept. 14.	Cash	674	100 00
Sept. 18.	Cash	677	12 60
1927			
Jan. 22.	Cash	126	19 70
Feb. 25.	Cash	137	16 50
Apr. 30.	Cash	121	126 70
Nov. 30.	Cash	224	100 00
Nov. 30.	Cash	226	~~49~~ ~~66~~
Nov. 30.	J	189	50 40
1928.			
Feb. 23.	Cash	9	25 00
Feb. 28.	Cash	10	200 00
Mar. 16.	Cash	12	31 50
Mar. 16.	Cash	12	41 50
		(Pencil)	723 90

This is a copy of original ledger sheet.

A. E. ENGLAND MOTORS, INC.

E. A. WEDEPOHL,

Secretary. [210]

(Testimony of E. A. Wedepohl.)

It was thereupon stipulated between counsel that the original ledger sheet referred to by Mr. Wedepohl was in the record and was admitted in evidence. Witness thereupon produced a doctor's certificate that Mr. A. E. England was confined to the hospital and unable to appear, said doctor's certificate being then admitted in evidence.

It was thereupon stipulated by and between counsel that there was a petition for sale of the car of G. W. Shute by the trustee, an order thereon and a bill of sale made to G. W. Shute in the sum of $900.00 subsequent to the bankruptcy proceedings.

It was further stipulated that a petition was filed with the Referee for release of the policy of insurance, and that a receipt was given by Judge Shute for the policy itself in order that he might avail himself of his rights under the policy.

TESTIMONY OF SYLVAN C. GANZ, FOR CREDITOR AND TRUSTEE.

(Called as a Witness by Creditor and Trustee.)

[211]

It was then stipulated by counsel that the testimony of Mr. Ganz with all exhibits attached thereto, given before the referee in bankruptcy, might be admitted in evidence and considered as taken at this hearing, and that the witness at this time would only be interrogated regarding new matters.

(Examination by Mr. NEALON.)

I have with me the savings account of Jessie M. Shute, and reading into the record therefrom there

(Testimony of Sylvan C. Ganz.)

is an entry on this account dated June 23, 1928, of a withdrawal of $1000, leaving a balance in the account at that time of $262.30. I also have the deposit account of George W. Shute in said bank, and reading therefrom there was a deposit in said account on July 12, 1928, of $1000. I have not the deposit slip on that. I have with me a $3400 deposit slip asked for in the subpoena.

Thereupon it was stipulated by counsel for the bankrupt that on September 17, 1928, G. W. Shute deposited in the First National Bank of Arizona $3400 in currency, and it was further stipulated that on December 31, 1927, Judge Shute cashed at the First National Bank of Arizona a check drawn by Wesley Goswick on the Valley Bank at Globe for $2000 and deposited $1900 of the money and retained $100 which he put in his pocket. It was further admitted by the counsel for bankrupt that Judge Shute would from time to time, whenever he was able to, deposit from his earnings money into Mrs. Shute's savings account, so the savings account will show the total amount put in there, and in fact all of it came from Judge Shute's personal earnings except rent from the house at Globe.

Thereupon it was stipulated by counsel for bankrupt that the following five checks signed by G. W. Shute were all deposited to Mrs. Shute's savings account by Judge Shute and might be admitted in evidence as one exhibit, being Creditor's Exhibit No. 8, as follows: [212]

CREDITOR'S EXHIBIT No. 8.

"Phoenix, Arizona, June 24, 1927.

FIRST NATIONAL BANK OF ARIZONA, 91–1.

Pay to Yourselves.....or bearer $500.00

Five Hundred .....no/100.....Dollars

G. W. SHUTE.

(Back)

(Rubber Stamp.)

The National Bank

5

Jun 24 1927

of Arizona

(Perforated)"

"Phoenix, Arizona, Aug. 22 1927

THE NATIONAL BANK OF ARIZONA, 91–1.

Pay to Yourselves.....or bearer $50.00

Fifty .....no/100..... Dollars

G. W. SHUTE.

(Perforated)

(Rubber Stamp)

The National Bank

5

Aug 22 1927

of Arizona"

"Phoenix, Arizona, Sept. 2, 1927. No. 480.

FIRST NATIONAL BANK OF ARIZONA, 91–1,

Phoenix, Arizona.

Pay to the order of Cash.....$100.00

One Hundred.....no/100.....Dollars

G. W. SHUTE.

(Across the End)
G. W. Shute
(Rubber Stamp)
First National Bank
Sep 2 1927
of Arizona
(Perforated)" [213]

"Phoenix, Arizona, Nov. 17, 1927.
FIRST NATIONAL BANK OF ARIZONA, 91–1.
Pay to Yourselves.....or bearer $100.00
One hundred.....no/100.....Dollars
G. W. SHUTE.

(Back)
G. W. Shute
(Perforated)
(Rubber Stamp)
The National Bank
5
Nov 17 1927
of Arizona"

"Phoenix, Arizona, Jan. 4, 1928.
FIRST NATIONAL BANK OF ARIZONA, 91–1.
Pay to Yourselves.....or bearer $500.
Five Hundred.....no/100.....Dollars
G. W. SHUTE.

(Back)
(Perforated)
(Rubber Stamp)
The National Bank
5
Jan 4 1928
of Arizona" [214]

(Testimony of Mrs. Sylvan C. Ganz.)

The transcript of testimony of Mrs. SYLVAN GANZ, given before the referee in bankruptcy on June 15, 1928, is as follows:

(Examination by the TRUSTEE.)

My name is Sylvan Ganz. I am vice-president of the First National Bank of Arizona and have been of its predecessor in interest for a number of years, and prior to that time I was in the bank in some executive capacity. I have with me the account of George W. Shute showing loans and discounts made to him.

(Witness hands document to referee.)

This account of George W. Shute shows transactions so far as loans and discounts are concerned from January 20, 1924, to April 10, 1928, of his own transactions, except where he might be a cosigner and is his original record. I will furnish you a copy of this, over my signature, to be placed in the record of this matter. I have a record showing loans and discounts of notes on which Judge Shute was a cosigner.

(Witness hands document to trustee.)

This is a sheet showing loan to S. V. Geare, covering period from May 1, 1924, to January 27, 1925. I will furnish a duplicate of that for filing in lieu of the original.

This is a record of a note of Joseph E. Noble on which G. W. Shute was a cosigner and guarantor. That loan is dated October 18, 1927, and the note was paid February 27, 1928. The books show this note was paid by Mr. Shute. I think the original

(Testimony of Mrs. Sylvan C. Ganz.)

note was delivered to Judge Shute when he paid it. We always deliver a note when it is paid. I have no savings account in the name of G. W. Shute. I have not in the name of Mrs. G. W. Shute, but it is Jessie M. Shute. This record which I show you is from our savings account register. The technical name is savings ledger. This is the sheet carrying the account of Jessie M. Shute [215] in our bank. It begins with an entry on October 28, 1926, with a deposit of $1100, and closes with an entry as of May 18, 1928, a deposit of $50.00. It shows a balance of $1262.30 on April 18, 1928. I will furnish a copy of that to be substituted for this original. I have not been able to find any certificates of deposit or exchange checks covering items that have not been paid. I have made a search. I hold a note at the present time signed by George W. Shute. I have it with me.

(Witness hands note to trustee.)

This was made by us on April 7, 1928, and the amount is $750. On that date our bank paid to George W. Shute the sum of $750 in the form of a Cashier's check. I think on the day following Judge Shute paid us $100,—on April 10th—for previous obligations to the bank. That appears on one of the sheets which I have filed here. I personally made this loan to Judge Shute and had conversation with him at this time. As nearly as I can recall, he came in and said he wanted $750; I said well, we would think about it, and he said that

(Testimony of Mrs. Sylvan C. Ganz.)

this time he wanted to give us security. He said "I will give you a chattel mortgage on my car." I told him we did not ordinarily take chattel mortgages, but he said he wanted to give it to us. I don't think it was mentioned at all whether there was any money due on the car.

Q. Did he make any statement that there was an encumbrance on it? A. No, sir.

Q. Did he state why he wanted the money at this particular time? A. No, sir.

Q. And you accepted his tender of security as being security without encumbrance on it?

A. Well, that question never came up; I assumed that it was, I suppose.

Q. At that time both he and you made the usual oath in regard [216] to a chattel mortgage, in which it was stated the car was his?

A. Well, whatever that clause is; whatever it says. It is presumed to bind him.

I have also brought the authorization showing Judge Shute has the right to check against the account of Jessie M. Shute, dated October 28, 1926, which applies to savings account #19061. I will furnish you a copy of that. I also have the ledger sheet of George W. Shute, which you requested. I also have cashier's check showing that we gave him $750 for the note. It was paid in cash, presumably by Judge Shute presenting it himself. There was no reason assigned why that was taken in the form of cashier's check rather than by depositing it to his account. He simply requested it in that form.

(Testimony of Mrs. Sylvan C. Ganz.)

I presumed you would want to know about cashier's checks. I found one which had been issued in cash. It is a cashier's check, $1500, to Leslie H. Creed. It bears the endorsement of Leslie H. Creed. I do not know him. This stamp on here indicates that it was paid by our bank on April 19th. It was drawn against the account of Jessie M. Shute. I will furnish you with a copy of that. We have a file card here, to help us in finding what we hunt for; it gives a history of the account. I did not have anything to do, personally, with the loan to Joseph E. Noble. Mr. Washburn is the officer of our bank who made that loan. I know nothing of the circumstances, except as disclosed by the record. I made the Geare loan. Mr. Shute came in and said this lady was a friend or client of his in Globe and he wanted to help her out by giving her a loan on some mining stock; it was of small value, and I suggested that in addition, he endorse the note, which he did. The money was then paid to Miss Geare, I believe. I know Miss Geare paid the note. The stock was in the bank, as well as the endorsement. It was Iron Cap, 100 shares. I have it marked for a copy to be made for you.

Q. I asked for the original deposit slip. [217]

You didn't give us time for that. It is an awful job. We will do it for you if you have to have it, but they would not reveal anything to you of value, I am sure. If you could tell me any particular one you wanted, I would get it for you. The original deposit tag reveals very little more than

(Testimony of Mrs. Sylvan C. Ganz.)

the ledger sheet. It very often doesn't show the nature of the deposit and it is a pretty hard job to get them out over a long [218] period of years.

(Examination by Miss BIRDSALL.)

I will submit to you for the record a copy of the deposit of December 31, 1927, in the amount of $1950.00 or $1900.00, which you ask for, and will submit any special ones you ask for later. The authorization for Judge Shute to draw on this savings account is still in force. In regard to the cashier's check to Leslie H. Creed dated April 14, 1928, for $1500.00, I have not with me the check or statement which was signed against the savings account for which this was issued, but I will submit a copy of that. I never saw the check. I just know we have it. I will submit a copy of this cashier's check to Leslie H. Creed. At the time we took the chattel mortgage on the car to secure the note for $750.00, I didn't know that a conditional sales contract due November 25, 1928, was of record, but we have a record of it. The matter was never discussed. It was a matter of no concern, as we would have loaned it to him anyway. The $100.00 note which he took up at the time he made this loan was due when he paid it. It was a 30-day note made March 9th, was due April 8th, and paid April 10th. No payment has been made on this $750.00. On the note of S. V. Geare, she did not come into the bank and sign the note. It was mailed to her. I think she was living somewhere in Missouri at the time, and Judge Shute mailed it to her. I have never

(Testimony of Mrs. Sylvan C. Ganz.)

had any personal transactions with her. Referring to counter check which you present to me signed by Judge Shute, January 4, 1928, payable to "yourself" for $500.00, I can tell that that came through the window at which he transacted business. That is number five, the savings window. It probably forms a part of the deposit of $1050.00 made on that day to the account of Jessie Shute; however, I am just guessing as to that. Referring to check you hand me dated January 4, 1927, $100.00, payable to cash, he got cash on that. There is nothing to indicate that that [219] went into the savings account. Referring to check handed me by you dated June 24, 1927, for $500 payable to "yourself" and signed by G. W. Shute, that went through the savings department and was credited to Jessie M. Shute on that date. Referring to this check dated November, 1927, and endorsed by G. W. Shute, $100.00, that went through the savings window and Jessie M. Shute is given credit the same day. The counter check you hand me payable to cash for $300.00 signed by G. W. Shute dated November 29, 1927, without endorsement, was paid in cash. I do not recognize the writing on the body of that check. The check you hand me for $150 dated November 17, 1927, payable to cash and endorsed by G. W. Shute, was paid in cash at the window where he does business. The check you hand me dated October 28, 1927, for $100.00, without endorsement, was paid in cash at the window where he does business. The check you hand me dated April 10th payable to

(Testimony of Mrs. Sylvan C. Ganz.)

"yourself" for $100.00 was to pay that note for $100.00. The check you hand me dated August 22, 1927, for $50.00 payable to "yourself" went through the savings window and was probably part of a deposit of $100.00 on that date to Jessie M. Shute. (In testifying as to these checks, witness in each instance examines checks before answering.)

(Examination by Mr. NEALON, Trustee.)

This record on the back of the account of George W. Shute in regard to conditional sales contracts—that information was taken from the Record Reporter. It is just a part of our system. If a check is handled through our exchange window and either part or all of it applied in exchange, that is if he would buy a draft or cashier's check, the check would show the cage number. That would be number 6. The savings window is #5. The window for certificates of deposit is #6. The window through which he would usually transact business is #4. [220]

(Examination by Miss BIRDSALL.)

Q. Do you know where the car is at the present time? A. I have never seen it. [221]

CREDITOR'S EXHIBIT No. ——.

Being Copies of Documents Attached to Transcript of Testimony of Sylvan Ganz Taken Before the Referee in Bankruptcy at Meeting of Creditors of June 15, 1928.

SAVINGS DEPARTMENT.

Phoenix, Arizona, 4/14, 1928.

Received of (OK 1500 M. D. Crandall)
FIRST NATIONAL BANK OF ARIZONA.
Fifteen Hundred & no/100——Dollars $1500.00.
Account No. 19061.

JESSIE M. SHUTE.
Copy.
S. GANZ, VP.

This receipt accompanied by pass book must be presented in person and will be retained by the bank.

FIRST NATIONAL BANK OF ARIZONA.

Phoenix, Arizona, April 14, 1928.

#44697.

Pay to the order of Leslie H. Creed $1500.00 Fif teen Hundred and no/100 dollars.

G. H. CALVIN,
A. Cashier

Cashier's Check.
(Marked Paid 4–19–28.)

Copy.
S. GANZ, VP

(Back)

Leslie H. Creed.

Pay to the order of

ANY BANK OR BANKER

ALL Prior Endorsements Guaranteed

91–119 Gilbert Branch 91–119 [222]

BANK OF CHANDLER.

Gilbert, Ariz.

Apr. 19, 1928.

Scott Bentley, Asst. Cashier.

The Valley Bank Phoenix, Ariz.

91–2.

Paid through clearings,

April 18, 1928.

Mail.

Authorized Signature of Jessie M. Shute. Savings Account No. 19061.

Amount 1100. Date Oct. 28, 1926.

I agree to abide by and conform to the by-laws, rules and regulations of the Savings Department of the First National Bank of Arizona, Phoenix, Arizona.

Sign Here—JESSIE M. SHUTE.

Address—81 W. Willetta.

Occupation— Birthplace—Arizona.

I hereby authorize G. W. Shute to sign checks on my account.

G. W. SHUTE.

Signature of Person Authorized—
JESSIE M. SHUTE,
Signat*or* of Depositor.
Copy.
S. GANZ, VP. [223]

JESSIE M. SHUTE. #19061.
Sig. JESSIE M. SHUTE.
IN ACCOUNT WITH FIRST NATIONAL BANK OF ARIZONA, PHOENIX, ARIZ.

Date.	Memo.	Withdrawn.	Deposits.	Balance.
10–28–26	New a/c.		1100.00	1100.00
11–18–26			500.00	1600.00
12–13–26	N.B.OK. G.	100.00		1500.00
Int. tp. 1–1–27			9.61	1509.61
6–24–27			500.00	2009.61
Int. to 7–1–27			30.56	2040.17
7–21–27			100.00	2140.17
8–22–27			100.00	2240.17
9–9–27			100.00	2340.17
9–22–27			100.00	2440.17
11–15–27			50.30	2490.47
11–17–27			100.00	2590.47
12–17–27			50.00	2640.47
12/23/27		100.00		2540.47
Int. to 1–1–28			46.83	2587.30
1–4–28			1050.20	3637.50
			50.00	3687.50
2–27–28		1235.20		2452.30
2–28–28			60.00	2512.30
2–17–28			50.00	2562.30
4–14–28			100.00	

4–14–28	1500.00		1162.30
4–18–28		50.00	1212.30
5–18–28		50.00	1262.30

Copy.

S. GANZ, VP. [224]

FIRST NATIONAL BANK OF ARIZONA.
Deposited by
G. W. SHUTE.
Phoenix, Ariz. Sept. 17, 1926.

Dollars. Cents.

Gold .....
Silver .....
Currency .....3400.....
Checks .....
" .....
(Number of blank lines.)

Copy.

FIRST NATIONAL BANK OF ARIZONA.
By F. E. ROSS,
A Cashier.
Total, $

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED.

(Instructions to Depositors, etc.)

FIRST NATIONAL BANK OF ARIZONA.
Deposited by
G. W. SHUTE.
Phoenix, Ariz. 12/31. 1927.

Copy.

Dollars. Cents.

Gold .....

Silver .....
Currency .....
Checks .....
" .....2000.....
(Number of blank lines.) [225]

Received
$100.00
From Above Items.
GEO. SHUTE.

Copy.
S. GANZ, VP.
1900.

Total, $

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED.

(Instructions to depositors, etc.)

THE NATIONAL BANK OF ARIZONA,
PHOENIX, ARIZONA.
LOAN AND DISCOUNT LEDGER.

Name—SARA VIRGINIA GEAR.
Address—

	No.	Date.	Security.
May 1, 1924.	1408	5–1	G. W. Shute 100 sh. Iron Cap Copper Co.
Aug. 7, 1924.	1408		Cert. #C1644
	2594	7–30	G. W. Shute 100 sh. Iron Cap Copper Co.
Nov. 7, 1924.	3820	10–28	G. W. Shute 100 sh. Iron Cap Copper Co.
	3820		
Jan. 27, 1925.			

(Continued)

Time	Due	%	Amount	Payment Amount	Payment Date	Balance Total Liability
90 d.	7–30–24	10	200.00			200.00
				200.00	8–7	
90 d.	10–28–24	10	200.00			200.00
				200.00	11–7	200.00
90 d.	1–26–25	10	150.00			150.00
				150.00	1–27	

Copy

S. GANZ, VP. [226]

THE NATIONAL BANK OF ARIZONA, PHOENIX, ARIZONA.

LOAN AND DISCOUNT LEDGER.

Name—G. W. SHUTE.

Address—

	No.	Date.	Security.
Jun. 20, 1924.	2035	6–20	100 sh. Cap. Stock
Sept. 19, 1924.	2035	9–19	Iron Cap. Cop-
Nov. 19, 1924.	31		per Co. Cert.
Dec. 18, 1924.	3119	12–18	#C 2130.
Dec. 18, 1924.	4371		
Jan. 19, 1925.	4371		
Sept. 5, 1925.	7403	9–5	
Dec. 15, 1925.			
Dec. 15, 1925.	8550	12–4	
Mar. 3, 1926.	8550		
Mar. 3, 1926.	9397	3–3	
Jun. 3, 1926.	9397		
Jun. 3, 1926.	10374	6–1	
Aug. 31, 1926.	10374		
Aug. 31, 1926.	11297	8–30	
Dec. 1, 1926.	11297		

Dec.	1, 1926.	12319	11–28
Feb.	26, 1927.	12319	
Feb.	26, 1927.	12238	2–26
Apr.	5, 1927.	13657	4–5
Jun.	6. 1927.	13657	
Jun.	6, 1927.	13238	
Sept.	21, 1927.	15392	9–21
Dec.	19, 1927.	15392	
Feb.	8, 1928.	409	2–8
Mar.	8, 1928.	716	3–9
Apr.	7, 1928.	1074	4–7
Apr.	10, 1928.	716	[227]

(Continued.)

Time.	Due.	%	Amount.	Payment. Amount.	Payment. Date.	Balance.	Total Liability.
90 d.	9–18–24	10	150.00				150.00
				150.00	9–19		
90 d.	11–18–24	10	150.00				150.00
				150.00	12–18		
90 d.	3–17–25	10	150.00				150.00
				150.00	1–19		
90 d.	12–4–25	10	200.00				200.00
				200.00			
90 d.	3–4	10	200.00				200.00
				200.00			
90 d.	6–1	10	100.00				100.00
				100.00			
90	8–30	10	100.00				100.00
				100.00			
90	11–28	10	100.00				100.00
				100.00			

Time	Due	%	Amount	Payment Amount	Balance Date	Total Liability
90	2–26	10	100.00			100.00
				100.00		
90	5–27	10	100.00			100.00
90	7–4	8	285.00			
				275.00		
				100.00		
90	12–20	8	100.00			100.00
				100.00		
30	3–9	8	100.00			100.00
				100.00		
30	4–8	8	100.00	100.00		
90	7–5	8	750.00			850.00
				100.00		750.00

Copy.
S. GANZ, VP.

THE NATIONAL BANK OF ARIZONA,
PHOENIX, ARIZONA.

LOAN AND DISCOUNT LEDGER.

Name—JOSEPH E. NOBLE.
Address— [228]

	No.	Date.	Security.
Oct. 18, 1927.	15693	10–18	G. W. Shute.
Feb. 27, 1928.	15693		

(Continued.)

Time.	Due.	%	Amount.	Payment. Amount.	Date.	Balance.	Total Liability.
	11–1–29	8	1200.00				1200.00
				1200.00			

Copy.
S. GANZ, VP. [229]

(Testimony of George F. Wilson.)

The trustee and objecting creditor thereupon asked counsel for bankrupt to produce the note of Joseph E. Noble, concerning which testimony had been given, and it was thereupon stipulated by counsel for bankrupt that the note was in Mrs. Shute's possession and would be produced in court at the afternoon session without prejudice to Mrs. Shute's rights therein. The same stipulation was made in regard to the production at the afternoon session of the note of Leslie Creed, said to be in Mrs. Shute's possession.

TESTIMONY OF GEORGE F. WILSON, FOR CREDITOR AND TRUSTEE.

(Called as a Witness by Creditor and Trustee.)

(Examination by Miss BIRDSALL.)

My name is George F. Wilson. I am President of the Old Dominion Bank of Globe, Arizona, and have been since 1917. I have not produced with me, in response to the subpoena a record—escrow record of a mortgage of G. W. Shute and Jessie M. Shute, his wife, because Mr. Foster has it. It was withdrawn from our possession some time, I think, about two or three weeks ago. I don't know the exact date. I recall I testified before the referee some time in November. It was in our possession at that time but it has been withdrawn since then by the attorney. I furnished to the referee, in connection with my testimony, a copy of that note and mortgage and of the payments that were made

(Testimony of George F. Wilson.)

[230] thereon. It was thereupon stipulated by counsel for bankrupt that a correct copy of the note and mortgage was attached to Mr. Wilson's testimony given before the referee in November and might be admitted in evidence.

I have produced here to-day the record of a certain contract between Wesley Goswick and L. E. Foster, which is in escrow in our bank. I have already furnished a copy of that contract, together with all payments on that in my former testimony before the referee. There has been additional payments made on that contract since I testified heretofore.

It was thereupon stipulated that the record of contract testified to and payments thereon attached to the testimony of witness given before the referee was correct and might be admitted as part of the testimony of this witness.

Since November 17th the following payments have been made on that contract: on November 27th, $407.50; December 3d, $2589.49. Now, there has been charged back against that contract an error of previous payment of $10.00, which would be a debit. On December 10th, $150.00; on December 27th, $975.38; on January 2d, $6374.62. Since the date of my former testimony modifications of that opinion contract have been filed with the escrow. I have the modification, copy of it. I couldn't state positively what date they were received.

Thereupon it was stipulated that the copy of letter modifying contract produced by the witness

might be received in evidence as an original, the same being admitted as Creditor's Exhibit No. 9, as follows:

CREDITOR'S EXHIBIT No. 9.

(Letter-head of Armstrong, Lewis & Kramer, Lawyers, First National Bank of Arizona Bldg., Phoenix, Arizona.)

"November 26, 1928.

Thos. Armstrong, Jr.,
Ernest W. Lewis, 1875–1927,
R. William Kramer,
G. W. Shute,
Robert H. Armstrong, [231]
Old Dominion Bank,
Globe, Arizona.

Gentlemen:

Referring to the matter of the escrow re sale of Ord Group, Goswick, Foster and the Mercury Mines of America, Incorporated, you will please be advised that the Mercury Mines of America, Incorporated, who has succeeded to the Foster interest, will not be able to make its payment as contracted on the 8th of December. Consequently the parties have agreed upon a modification thereof, copy of which is enclosed you herewith for your files. The original of this agreement is with us, where it will be held awaiting orders from Mr. Goswick relative thereto.

As you will note from the new arrangement, the old [232] agreement on royalties continues and

the payment per month continues and the last payment will be discharged at the rate of $7500.00 per month. Will you please acknowledge receipt of this notice and copy so that our files will be complete on the matter.

Very sincerely yours,

ARMSTRONG, LEWIS & KRAMER.

By G. W. SHUTE.

GWS:c.

* * * * * * * * * * *

MODIFICATION OF CONTRACT.

KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the mutual benefit of the parties hereto, it is hereby agreed that certain agreement made and entered into the 8th day of December, 1926, by and between WESLEY GOSWICK of Roosevelt, Arizona, of the one part, therein called the Vendor, and L. E. FOSTER of Silver City, New Mexico, of the other part, therein called the Purchaser, be and the same is hereby modified, altered and changed as follows:

Sub-paragraph 2, Paragraph 2 on page 2 of said agreement be and the same is hereby modified and changed so that the same will read as follows:

The sum of Five Thousand Dollars ($5,000) in case at the time of the execution and delivery of this agreement.

The further sum of Ten Thousand Dollars ($10,000) on or before the expiration of six months from the date of this agreement.

The further sum of Twenty Thousand Dollars ($20,000) on or before the expiration of one year from the date of this agreement.

The further sum of Eighty-two Thousand Five Hundred Dollars ($82,500) on or before the [233] expiration of eighteen months from the date of this agreement, and the further sum of Eigthy-two Thousand Five Hundred Dollars ($82,500) payable as follows:

Seventy-five Hundred Dollars ($7500) on the 8th day of December, 1928 and Seventy-five Hundred Dollars ($7500) on the 8th day of each month thereafter until the whole sum of $82,500 is paid. It being understood between the parties that the monthly payment of $150.00 per month and the royalties herein described apply on the purchase price as of the dates the same are made.

Paragraph 8 on page 5 of the aforesaid agreement be and the same is hereby modified and changed so that it will read as follows:

It is agreed by and between the parties hereto that in the event said Purchaser shall fail, neglect or refuse to make the payments hereinbefore set forth, or fail, neglect or refuse to perform any of the other terms of this contract, and the same shall be declared forfeited to the said Seller hereunder, all tools, supplies, machinery and equipment of every kind placed by the aforesaid Purchaser, his successors or assigns, upon said premises shall become the property of said Seller as of the date when such Purchaser, his successors or assigns, shall fail, neglect or refuse to perform the terms of this agreement or make the payments as herein provided for.

It is further agreed between the parties hereto that the escrow holder named in the aforesaid agreement be notified of the changes occurring in

(Testimony of George F. Wilson.)

said agreement by the handing and delivering to the said escrow holder of a copy of this Modification of Contract. [234]

Instrument signed in triplicate the 6th day of November, 1928, by Wesley Goswick and by Mercury Mines of America, Inc., by Herbert S. Crowther, President, attested by the secretary and sworn to on the 13th day of November, 1928, and acknowledged by Wesley Goswick before a notary public in Maricopa County, Arizona, on November 6, 1928. [235]

TESTIMONY OF MR. WILSON (Continued).

These payments that I have testified have been made on this contract since the date of my former testimony have all been credited to the account of Wesley Goswick. I have the original letter of instructions of former modification of August, 1927, in my possession. I have furnished copies of these letters with the former modification of this contract in connection with my former evidence.

Miss BIRDSALL.—I just wanted to get an admission from counsel. Mr. Moore, will you tell me if the initialing on the side of that letter of instructions "G. W. S." is in the handwriting of G. W. Shute?

Mr. MOORE.—It does not look like it. I will ask the Judge about it and, if he says it is, I will admit it. Yes, I admit that, Miss Birdsall.

Miss BIRDSALL.—With that, I think the copies may be used in evidence, your Honor.

On these payments that have been made since my former testimony I have credited the whole amount

(Testimony of George F. Wilson.)

to Wesley Goswick. That is by special agreement with Mr. Goswick. He comes in the bank and makes a settlement with Mr. Packard under the terms of that letter. Of the former letter in connection with the distribution of the money between Mr. Packard and Mr. Goswick. Formerly 35% of the money was paid first to Mr. Goswick. That was beginning at the time the letter was received, but prior to that time it all went to Mr. Goswick. In August, 1927, there was an agreement by which first 35% was paid to Mr. Goswick's account, and the other 65% was divided equally between Mr. Packard and Mr. Goswick, and that was down up to the time that I gave my testimony at the previous time. Since that date, the amounts have been credited to the account of Wesley Goswick, awaiting Mr. Goswick to come in and make a settlement, that is, an adjustment between themselves. [236] Mr. Packard consented to it. He done it before and we assumed that he has accepted it again. Mr. Goswick didn't give us those instructions. That was an agreement between Mr. Packard and Mr. Goswick. I got my authority to do that from Mr. Packard and Mr. Goswick. When this letter was filed, why, the agreement was that these payments were to be credited to Mr. Goswick until they came in and adjusted it between each other and then they made an adjustment at that time just prior to the time that I testified before and now we are holding these additional payments for that same adjustment between them. The money has all been divided according to the instructions in that letter, except the last payments that have been made—the last few

(Testimony of George F. Wilson.)

payments. We have no written instructions from Mr. Packard and Mr. Goswick about these latter payments being applied to the account of Wesley Goswick. Those two payments have not been actually *been* divided between the two. They are still in the bank to the credit of Wesley Goswick.

Miss BIRDSALL. — Q. Mr. Wilson, you have formerly testified as to a settlement that you made with G. W. Shute in June, 1927, of some indebtedness that was owing to the bank; is that right?

A. Yes, ma'am.

Q. How long had that indebtedness been owing?

Mr. MOORE.—We object to that, your Honor, going into how long Judge Shute had owed the bank, a debt which was paid in 1925, I believe, it was.

A. '23, I think.

Miss BIRDSALL.—No, '27, the bank was paid.

A. 1927.

Miss BIRDSALL.—It goes to the matter of the insolvency of the debtor at the time of his insolvency.

The COURT.—There isn't any question about his insolvency, is there?

Miss BIRDSALL.—There might be a question as to the time of the [237] insolvency. That is our position that gifts made during that time are void. He has testified to a number of gifts made during a period at which time we believe he was insolvent.

Mr. MOORE.—For the purpose of this proceeding, your Honor, I think we can safely state, within the meaning of the bankruptcy law, that Judge

Shute has been insolvent during the past ten years like most of us.

Miss BIRDSALL.—I think this goes back even a further period than that.

The COURT.—Oh, well, I don't care to go back ten years. I don't see that that is material to the issues involved in this case.

Miss BIRDSALL.—It might be, if he had made any gifts during that time; that he did not retain sufficient property to pay his debts.

The COURT.—Do you mean that when people are insolvent to make a gift of money or something else is sufficient grounds to bar a discharge?

Miss BIRDSALL. — It might be sufficient grounds to consider a gift made void and that would go to the title of the property.

Mr. MOORE.—Well, the Court is open to you to adjudicate that. That is not before this Court or involved here.

Mr. NEALON.—Yes, before this Court right now. May I just suggest a thing in that connection, your Honor? It has quite a bearing upon our contention in regard to the Globe property. Now, Judge Shute's contention, which now is that that is separate property, we claim that it is community property. Whether he had a right to give her money—put the property in her name or anything of that kind while he is insolvent, is a very material matter. Now, we wish to show how long he has been insolvent.

The COURT.—There is an admission that he has been insolvent for ten years. Isn't that sufficient? [238]

(Testimony of George F. Wilson.)

Mr. NEALON.—No, not under the testimony.

Mr. MOORE.—How long do you want to go back, Judge Nealon?

Mr. NEALON.—We want to go back to 1912.

The COURT.—I sustain the objection. I don't think that is material.

Mr. NEALON.—An exception, please.

The COURT.—Yes, you may have an exception.

On November 17, there was a withdrawal of $300.00 and $1200.00 from the account of Wesley Goswick. Since that time there have been the following: On November 20, $300.00. On November 28, $1642.25 and on December 3, $75.00. On December 8, $1200.00. On December 10, $70.54, $86.95 and $500.00. On January 2, $1,000.00. On January 4, $100.00. The balance in that account at the present time is $9,882.86. There has been no change in the status of the savings account of Wesley Goswick since my former testimony except an addition of interest, $250.00. The balance in that account at the present time is $25,250.00. The checks have all been delivered to Mr. Goswick. I have no knowledge of whom those checks were payable to.

Cross-examination by Mr. MOORE.

I stated that some three weeks ago Mr. Foster withdrew the papers covering the Holmes-Shute mortgage from escrow. That is Graham Foster, an attorney. He is attorney for Mrs. Holmes. I stated in my direct testimony that the original of Plaintiff's Exhibit No. 9, which is the modification of the Wesley Goswick contract, the modification being dated the 6th day of November, 1928. That

(Testimony of George F. Wilson.)

letter says, "The original of this agreement is with us, where it will be held awaiting orders from Mr. Goswick relative thereto." That is the best of my information. [239]

TESTIMONY OF GEORGE F. WILSON, FOR CREDITOR AND TRUSTEE.

(Given Before the Referee on November 17, 1928.)

(Examination by Miss BIRDSALL.)

My name is George F. Wilson. I am president of the Old Dominion Bank of Globe, Arizona, and have been president of that bank about eleven years. Old Dominion Bank is not a consolidation of other banks; we purchased the Copper Cities Bank outright. The Copper Cities Bank was the successor of the First National Bank, the Bank of Miami and the Bank of Superior, — all three. These three banks were merged in the Copper Cities Bank and we purchased the business, only, of the Copper Cities Bank. The present Old Dominion Bank has the business of the old First National Bank and of the Copper Cities Bank. I have produced here the record of my bank showing accounts of the bankrupt, George W. Shute or Jessie M. Shute. My time for a complete search was very short, but as near as I can say positively now, the only thing we have in the name of the bankrupt, George Shute or his wife is an unpaid escrow. There has been no account in his name for a long time. It really isn't exactly an escrow, either; it is a collection. It is a note and mortgage of Mary E. Holmes, Guardian in the McKillop estate. It is a note due Mary E. Holmes. Many of these payments listed here on the

(Testimony of George F. Wilson.)

note which I have have been made direct to Mrs. Holmes, and there is no endorsement at all on the note. The note is for $3500, dated January 17, 1921, and the note is for collection. The attorney who left that with me was either Graham Foster or his brother. We have a letter of instructions with reference to it from Mrs. Holmes dated October 11, 1926.

(Whereupon witness reads letter as follows:)

"Old Dominion Commercial Company,
Banking Department,
Globe, Arizona. [240]

Dear Sirs:

I enclose statement of payments made on George W. Shute note made since my last statement. Please endorse same on the note.

Yours,
MARY E. HOLMES."

The statement shows what payments were made, but we did not endorse them on the note because we hadn't received them, and we thought best to let her endorse them on herself. She doesn't state what was due in 1926, except that we assumed these small amounts were interest payments, and then there is one payment on September 17, 1926 of $3,000. The note is signed by G. W. Shute and wife on some property I understand she owned. But G. W. Shute is the principal maker of the note. He signs first.

The TRUSTEE.—Q. Mr. Wilson, will you have made for the record a copy of the statements of payments attached to the letter of Mrs. Holmes dated October 11th, 1926, and also copy of the

(Testimony of George F. Wilson.)

original note, and send them to the Referee here to be attached to your testimony?

A. You want a copy of the payments reported by Mrs. Holmes?

Q. A copy of the payments made to Mrs. Holmes and copy of the original note signed by George W. Shute and Jessie M. Shute. I think it would be well to have these in view of the testimony here.

A. All right, I will send them down.

So far as I have examined, there was no checking or savings account of George W. Shute or Jessie M. Shute in my bank. He never banked with my bank in Globe in recent years. I only went back to 1926. I am sure he did years ago. Mr. Shute owed the Old Dominion Bank certain notes. I have a memorandum of those notes. They are paid, but they were not paid in full. There were three notes. The first note was by G. W. Shute to the Old Dominion Bank, dated April 4, 1924, for $1017.69; accrued interest $183.06; the second note was by G. W. Shute to the Old Dominion Bank, on [241] the same date, for $2923.47; accrued interest, $526.14, making a total of $3949.16, and accrued interest $709.20; the grand total was $4650.36. [242]

I made settlement of those notes by selling those two notes to Judge Shute for $700. The date of the settlement was June 30, 1927. I settled the total amount for $700. There was another note representing other indebtedness, but that was a separate transaction. These notes were in 1924. That was an accrued indebtedness that went back prior to 1913. I don't know how the indebtedness

(Testimony of George F. Wilson.)

was originally created because it was prior to my connection with the bank. There was no security whatever for that. Mrs. Shute's name was not on the paper. From the time I entered the bank and became its president eleven years ago I endeavored many times to collect that amount from Judge Shute. The only payment he ever made was one payment of $25. I do not recall when it was made, but I believe it was about the time these notes were renewed, the last time in 1924. During all of that time he insisted that he was unable to pay those notes. I never located any property out of which collection could be made. The only thing he had was a car, but we realized that nothing could be gotten out of that. It dated from eleven years ago that I started to endeavor to collect this, and the indebtedness had been standing then for some years. I have been familiar with it since 1913, when I became a director. The loan was originally made to Mr. Shute by Governor Hunt. The date of the $700 compromise was June 30, 1927. The other note I have referred to was signed by G. W. Shute and Harry A. Shute, payable to the Copper Cities Bank, dated January 2, 1925, in the amount of $3000.00, accrued interest $425.63. The total was $3425.63. We settled that for $1500 on the same day in June, 1927. I don't know the origin of this last indebtedness. It came to us through the Copper Cities Bank. I don't know whether that had anything to do with a loan on some cattle. There was no security. This was a renewal. It

(Testimony of George F. Wilson.)

was renewed once or twice and two or three payments made. I don't think it went back as far as 1912 and 1913, but I [243] don't know my understanding from Mr. Greer was that it was a fairly recent transaction. Harry A. Shute has some property, and that was the reason we made so much better settlement on that note. We threatened to force collection and attach some of his property, and a better settlement was made. This amount of $1500 paid in settlement was all paid by Judge Shute. I don't know whether he was reimbursed, but the whole amount was paid by Judge Shute. I have no record of a safety deposit box in his name or his wife's. They have not had a safety deposit box with us in recent years. I know there is none there now. I brought with me the record of Virginia Wentworth in my bank. It is both a checking and savings account. Referring to this checking account of Virginia Wentworth, her balance in our bank on the 1st of December, 1927, was $92.13. Passing on down through December, 1927, the largest amount deposited in the account during that month are two deposits, both $40. The balance in the account on the 31st of December was $40.38. There were no large withdrawals or deposits during November or December, 1927. There was not as much as $900 in the checking account at that time. They are apparently all small items, the largest being $60. Going through [244] that checking account, it doesn't seem to have ever reached as much as $200 at any one time. On November 15th of this

(Testimony of George F. Wilson.)

year the balance in the account was $99.37. There was no deposit in the account in January, 1928. The withdrawals were some small checks; $20 was the largest of these. Referring to the savings account of Virginia Wentworth, the number of it is 2473. That has been in our bank for two years. Prior to that it was in First National and Copper Cities; it was one of the accounts we took over. The amount of it is $217.24. The amount of it on the 1st day of December, 1927, was $101.26; the interest came in there. There were no withdrawals during December, 1927. The amount of that account on the 1st day of January, 1928, was the same amount. The total amount was withdrawn on January 28, 1927. It was closed out before January, 1928, and was reopened on the 14th day of May, 1928. The amount of $72.00 was put in then. I think I made a mistake in the dates. The amount in that account on December 1st, 1927, was $103.28. There was no change in the account from July 1, 1926, except interest payments, until January 28, 1927; no deposits or withdrawals until that date. There couldn't have been any money there in December, 1927. The account had been closed and was reopened in May, 1928. It was opened with $72.00. The present amount of it is $217.24. There have been no withdrawals between May and the present time. It is my impression that our bank did not make any loan to Virginia Wentworth during the period from November 1, 1927 to January 1, 1928. I am not the credit man in smaller amounts. Any

(Testimony of George F. Wilson.)

amount approximating $1,000, I would know of. I don't think there was any loan of that amount or over. We have an escrow here between Wesley Goswick, of the first part, and L. E. Foster of Silver City, party of the second part. It is an escrow for mining deed, under which certain payments are to be made. The total purchase price of the property under that contract is $200,000. The payments to be made on that contract were $5,000 [245] in cash at the time of the execution of the agreement, which was December 8th, 1926; the first payment after that was $10,000 within six month; and the next one was $20,000 within one year; then $82,500 within 18 months,—that is on or before 18 months; and $82,500 within two years. That completed the payments. The contract was not drawing interest on those deferred payments, apparently. The party of the second part was L. E. Foster. These are the only parties to that contract. I have the record showing what payments have been made under that contract. I will read them into the record. It starts out with a credit of $5,000, on December 9, 1926; on the same date, $150.00 paid. That last seems to be the monthly payment; nearly all the payments are that. Of course it is barely possible that it bears interest, but I see no mention of it; they are, apparently, all payments on the principal.

(Reading payments into the record:) January 9, 1927, $150.00. On February 9, 1927, $150.00; on March 9, 1927, $150.00; on April 9, 1927, $150.00;

(Testimony of George F. Wilson.)

on May 9, 1927, $150.00; on June 9, 1927, $8,950.00. Then we start again on the same date, June 9th, with $150; on July 11, 1927, $150; on August 10, 1927, $150.00; on September 9, 1927, $150.00; on October 11, 1927, $150.00; on November 14, 1927, $150.00; on December 7, 1927, $13,051.41; then, on the same date, $1600.00; and on the same date again $4,448.59; then on the 12 of December, $150.00; on February 27, 1928, $413.00; on March 8, 1928, $150.00; on March 27, 1928, $62.82; on April 9, 1928, $147.50; on the same date $885.00; on April 9, 1928, $147.50; on the same date $885.00; on April 11, 1928, $708.00; on April 11th again, $150.00; on April 14, 1928, $29.50; on April 24, 1928, $610.00; on May 3, 1928, $600.00; on May 7, 1928, $30.84; on May 10, 1928, $150.00; on June 2, 1928, $152.50; on June 8, 1928, $77,960.83; on June 7, 1928, $150.00, and same date, $150.00; on June 12, $150.00 on June 27, 1928, $91.50; on July 10, $150.00; on August 7, 1928, $780.75; on [246] August 14th, $150.00; on August 27, 1928, $909.38; on September 8, 1928, $150.00; on September 25, 1928, $1081.88; on October 11, $150.00; on November 2, 1928, $889.50; on November 14, 1928, $150. We did not have escrow instructions accompanying this contract, except the contract and a letter from Mr. Goswick, which is this file here. The escrow has never even been signed by Mr. Goswick. These payments are all the payments that have been made up to November 14th. The total amount due now is $78,006.09. We have a lot of these statements here, and I think a lot

(Testimony of George F. Wilson.)

of them are royalty payments; I think you will find all payments here other than the $150 a month. All the smelter returns have been credited on the escrow agreement and are included in the figures I have read into the record. Every dollar we have received has been credited on the escrow. I have here a telegram stating that a draft has been paid as one of those payments. I will read into the record the letter I have from Mr. Goswick, stating our instructions.

(Witness reads letter:)

"December 19, 1926.

Old Dominion Bank,

Globe.

Gentlemen:

This envelope is deposited with you in escrow subject only to the following instructions:

These papers are to be delivered to L. E. Foster or his order, or assigns, upon demand, when the said L. E. Foster, his agent or assigns, shall deposit with you to the credit of Wesley Goswick the full amount of the total consideration to be paid in the sum of $200,000 at the times and in the amounts as follows, to wit:

> $5,000 heretofore paid; $10,000 on or before six months from date; $20,000 on or before one year from the date hereof; $82,500 or or before 18 months from the date hereof; $82,500 on or before two years from the date hereof.

You are instructed that if said payments are not made in the amounts hereinbefore set forth, to ac-

(Testimony of George F. Wilson.)

cept no further payments thereon, and to deliver the enclosed papers to Wesley Goswick, or his order, on demand, time being the essence of these instructions.

You are hereby relieved from any and all liability [247] and claim or claims whatsoever in connection with the receiving, retaining and delivering of the enclosed papers except such liability as may arise in the retention or delivery of such amounts.

Dated at Globe, Arizona, this 9th day of December, 1926.

L. E. FOSTER."

In accordance with those instructions, the payments have been made so that that contract is alive and in force at the present time. The final payment is due next month. I believe it is the 9th. The escrow calls for payment on December 9th.

Q. I am going to ask you when you return to Globe, to have copy of this contract made and we will pay all charges; you can send down and it will be attached to your testimony.

The other letters I spoke of are here.

(Witness submits three letters.)

These three letters, the one dated December 13, 1927, one August 20th and one August 22d, 1927, are the only three communications I have in regard to this escrow.

(Copies of these three letters were submitted in evidence and attached to the testimony of George F. Wilson.)

(Testimony of George F. Wilson.)

I am not certain whether I have a record in my bank of the former option or agreement concerning this property—I haven't looked it up. I did look the matter up between Goswick and any other party; if there has been any other agreement it has been set aside in favor of this one. These claims were previously optioned, but the parties relinquished them. I think all the papers were returned to the parties when the option was forfeited. I know that there was such an option. I don't know the date or any of the details of it, but I do know that such an option existed. I never saw the contract, but I know it existed. I do not know the parties, other than Goswick, but if there ever was such a contract in our bank we will have the escrow instructions left in the files. [248] I will have it looked up and a copy mailed to you or Mr. Smith. I have with me the account of Wesley Goswick. I don't believe I can give the date Wesley Goswick started account in our bank. I brought only the sheets from February 14th, 1926. I know he had an account previous to that, because he had a balance brought forward. The balance at that date was $2,153.00, even. In the instructions under this escrow which I have testified about and the letters given me by Mr. Goswick in connection with the disposition of money, I deposited certain sums of money received on that escrow to the account of Wesley Goswick. We divided the money according to his instructions and deposited his percentage to his account. I am under the impression that

(Testimony of George F. Wilson.)

the portion that was to be given to Mr. Packard was also deposited. I am reasonably certain that he carries an account in our bank. The cancelled checks of Goswick have been returned, except the few that have been issued since the 1st of November. We return them each month. I don't know whether he has other banking connections. I would say he does the major part of his business through our bank. The address where we send Mr. Goswick's statements is on the sheet there. One is marked "Roosevelt, Arizona," and the other is marked "Arizona Quicksilver Company, Heard Building, Phoenix." His present address is Roosevelt. This one was marked Heard Building, and then it was changed to Roosevelt. I am sure he gets his mail at Roosevelt. The mine is about 95 miles from Globe, so that would make it about 35 miles from Roosevelt. It is nearer Payson, but if it was sent there it would have to be sent back. The only parties who have received any part of the payments that have been received on that escrow are Mr. Goswick and Mr. Packard, through our bank.

Q. I will ask you, Mr. Wilson, to have a complete statement made up of the account of Mr. Goswick, from the 1st day of January, 1925, up to the present time, and submit it for our [249] records, and also copy of the account of William A. Packard, if there is any in the bank, covering the same period of time. A. Very well.

Q. I have here the complete deposit slips of Wesley Goswick to June 9, 1927, in the amount of

(Testimony of George F. Wilson.)

$9100.00; December 7, 1927, in the amount of $19,-100; December 9, 1926, $5150; one dated 12/12/27, $12,600, and one dated 6/8/1928, $51,148.33, and will ask you to have copies made by your bank of these deposit slips and send them over for the record.

A. I think there is a duplication there. You have one there for $19,100; that was a wrong entry; was credited and charged the same day. This was changed to $12,600 to Goswick and $6,500 to Packard; that $19,100 is a duplication.

Q. Well, we would like to have copies of these anyway.

Q. When you send over the account of Mr. Goswick, will you make up the account of Mr. Packard the same way, please. A. All right.

This constitutes all that I have produced in the way of records, in answer to subpoena, except there is the savings account of Mr. Goswick, of $25,000.

(Mr. Wilson produced a card, showing savings account #3586, in the name of Wesley Goswick, showing the amount of $15,000 deposited September 17, 1928, and that amount still being the balance in such account.)

That was a check deposited, by transfer from the checking account. I do not know if Mr. Goswick has any investments in this county. My understanding was that he was purchasing a ranch in Maricopa County; I heard some talk of it. As I recall it, it was a ranch in the Salt River Valley, so I suppose that would be in Maricopa County. I could not say as to whether we have any record in

(Testimony of George F. Wilson.)

our bank of a transaction between G. W. Shute and Jessie M. Shute and Hoyt Medlar in which certain property was transferred from Shute to Medlar and mortgage given back to Shute, afterwards assigned [250] to the First National Bank of Globe, for $3629.30. That was handled either by the First National or the Copper Cities, but we acquired that particular property from the Copper Cities; we own it now. It was taken over on that mortgage. I do not know the details of it. I could not say whether Shute or his wife got anything out of that property. That was all concluded and the property turned over to the Copper Cities Bank before we took it over. The only reason I know about it is that the property still stands on our books as the Medlar property, and we own it. I have no knowledge that the proceeds of the sale of that property went into the property now standing in the name of Jessie M. Shute in Globe, known as the Spates property. If the bank held the mortgage the records of Gila County would show it. The Copper Cities records should then show that became of the money and the date, and to whom. Whether they do or not, of course I don't know, but we have most of the records. You see it was a closed transaction before we went in there. We have the property and it was discussed how they had acquired it, at the time we were taking up papers, and, as I say, it still stands on our books as the Medlar property. With regard to indebtedness which we settled with Mr. Shute last year consisting

(Testimony of George F. Wilson.)

of a note signed by him and his brother Harry Shute, they were both makers of that note, but I think Harry's position was what we call an accommodation maker. The note did not show that, but it has been returned to Shute. I recall the note very distinctly however; it was signed by Judge Shute and also by Harry, but it was generally understood in our conversation that he was really an endorser. The word "surety" did not appear. As far as the records show, it was a joint note, on which both were principals. That is the reason it was settled for a larger amount. We were sorry for Harry, and didn't want to force him to the wall; it would probably have broke him to pay it. So far as I know, I have submitted or will have submitted when I [251] have handed over the papers you have requested here,—everything that relates to this bankrupt.

(Examination by TRUSTEE.)

I have known Judge Shute almost since his birth; ever since he was a little boy. Of my own knowledge I could not be certain of fixing a date in my mind as to the time when he was solvent. It would be hard to say. It was my understanding that he was solvent when he left Globe to come to Phoenix, but since then I don't know. We know he wasn't solvent then. We always felt that he would have had the means to pay his obligations if he had cared to. He didn't have any property, but we always felt that if he wanted to, he could have paid the major portion of his indebtedness to us, just from his earnings. I didn't know of any property he

(Testimony of George F. Wilson.)

had, other than this property claimed by his wife, the White-Medlar property, during the years since I have known him. He only had an automobile; he always had a car. During that same period I had no information as to any amount of personal property. He always owed money to somebody, ever since he has been big enough to owe it. We never felt he had property that could be attached. Mr. Greer could give you all the information with regard to this earlier transaction with the bank which we purchased, about the origin of that loan, the loan that we finally compromised. Governor Hunt could probably give you the origin of the indebtedness we settled for $700; that was largely accrued interest. Interest had been accruing since 1913; it was fifteen years interest, and the principal, you see, didn't amount to much. That indebtedness existed all that time. It was during Hunt's connection with the Old Dominion Commercial Company; it was probably a store bill, originally. [252]

(Examination by Miss BIRDSALL.)

I do not know anything about a transaction of Judge Shute where he and his brother had some cattle. He may have borrowed money on them at the First National or the Copper Cities, but not through the Old Dominion. I did not know he owned racehorses.

(Documents as follows attached to transcript of testimony of Mr. George F. Wilson before the referee in bankruptcy on November 17, 1928, were admitted in evidence by stipulation as true copies of original documents and to be considered as originals:) [253]

Copy.

December 13, 1927.

Old Dominion Bank,
Globe, Arizona.

Gentlemen:

Referring to letter written under date of August 20th, 1927, signed by myself and William A. Packard, in which you are instructed to deduct from all payments made to you, 35% of such payments which you will credit to my account and the balance remaining to be divided equally between myself and William A. Packard.

The amount in the first transaction is $20,000.00. and of that amount, Mr. Packard is to receive $6,500.00, the remaining balance to be credited to my account.

Very truly yours,
WESLEY GOSWICK. [254]

Copy.

ARMSTRONG, LEWIS & KRAMER.
Lawyers.
First National Bank of Arizona Bldg.
Phoenix, Arizona.

Thos. Armstrong, Jr.
R. William Kramer.
James R. Moore. August 22, 1927.
G. W. Shute.
Robert H. Armstrong.

Orme Lewis.

Old Dominion Bank,
Globe, Arizona.

Gentlemen:

Referring to that escrow held by you between

Wesley A. Goswick and L. E. Foster, dated about the 8th of December, 1926, beg to advise that in a settlement of his affairs Mr. Goswick has agreed to give William A. Packard a certain share of any fund to be paid to your bank under the terms of this option, and to that end we enclose you herewith a letter dated August 20, 1927, addressed to you, and signed by Wesley Goswick, accepted by William A. Packard, which disposes of the money received under this option.

Will you please acknowledge receipt of the letter to Mr. Goswick, as well as to William A. Packard, so that they may know that you have received notice of it and that it is agreeable to you.

With kindest personal regards we beg to remain,

Very sincerely yours,

ARMSTRONG, LEWIS & KRAMER,

By G. W. SHUTE.

GWS:c.

cc Wesley Goswick.

William A. Packard. [255]

Copy.

Payson, Arizona, August 20, 1927.

Old Dominion Bank,

Globe, Arizona.

Gentlemen:

Referring to an escrow held by you, executed by L. E. Foster and Wesley A. Goswick, dated on or about the 8th day of December, 1926, wherein you hold a deed to mining claims to be delivered to L. E. Foster, his heirs, executors, administrators or assigns, upon receipt and payment to you to the order and credit of Wesley A. Goswick the sum of

$200,000.00, you will please deduct from all payments hereafter made to you 35% of such payments, which you will credit to the account of Wesley A. Goswick, and the balance remaining of such payments you will divide equally into two parts, one part of which shall be credited by you to Wesley A. Goswick and the other part to William A. Packard of Payson, Arizona, or his order.

Respectfully yours,
WESLEY GOSWICK.

Accepted:
WM. A. PACKARD. [256]

3500.00. Globe, Arizona, January 17th, 1921.

THREE YEARS after date, for value received, without grace, I promise to pay to Mary E. Holmes, as Guardian of the estate of Helen H. McKillop, an incompetent, or order, at the First National Bank, Globe, Arizona, the sum of Thirty-five Hundred & 00/100 ($3,500.00) Dollars, with interest at the rate of ten per cent (10%) per annum from date until paid, said interest payable quarterly, and ten per cent (10%) additional for attorney's fees, if collected by law or placed in the hands of an attorney for collection. Each party hereto waives presentment for payment, notice of non-payment, protest and notice of protest, and diligence in bringing suit against any party hereto, and each party signing this note consents that time of payment may be extended without notice.

G. W. SHUTE.
JESSIE M. SHUTE. [257]

THIS AGREEMENT, Made and entered into this 8th day of December, 1926, by and between WESLEY GOSWICK of Roosevelt, State of Ari-

zona, of the one part, hereinafter called "Vendor," and L. E. FOSTER of Silver City, State of New Mexico, of the other part, hereinafter called "Purchaser,"

WITNESSETH:

(1) That the Vendor, for and in consideration of the sum of One Dollar ($1.00) to him in hand paid by the Purchaser, the receipt whereof is hereby acknowledged, and of the covenants, promises and agreements hereinafter set forth which are to be kept, observed and performed by the Purchaser, does hereby covenant, promise and agree that upon the payment of the purchase price of TWO HUNDRED THOUSAND DOLLARS ($200,000.00) good and lawful money of the United States of America, at the times and in the manner hereinafter specified, he will sell, transfer and convey to the Purchaser, or to his order, by a good and sufficient quitclaim deed, duly executed by the Vendor and his wife, if he has one, all those twenty-(20) certain unpatented lode mining claims situate upon and near what is commonly known as Slate Creek, Gila County, State of Arizona, the names of which, together with books and page of record, as the same appear in the office of the County Recorder of Gila County, State of Arizona, are as follows:

* * * * * * * * * * *

(Here follows description with book and page of record, same not copied here.)

* * * * * * * * * * *

(2) The purchase price of Two Hundred Thousand Dollars ($200,000.00) shall be paid into the Old Dominion Bank at Globe, State of Arizona, by the Purchaser, his heirs, executors, administrators

or assigns, to the order and credit [258] of the Vendor, at the times and in the amounts as follows:

The sum of Five Thousand ($5,000.00) Dollars in cash at the time of the execution and delivery of this agreement; the further sum of Ten Thousand ($10,000.00) Dollars on or before the expiration of six (6) months from the date of this agreement; the further sum of Twenty Thousand Dollars ($20,-000.00) on or before the expiration of one year from the date of this agreement; the further sum of Eighty-two Thousand Five Hundred Dollars ($82,-500.00) on or before the expiration of eighteen (18) months from the date of this agreement, and the further remaining sum of Eighty-two Thousand Five Hundred ($82,500.00) Dollars on or before the expiration of two (2) years from the date of this agreement.

* * * * * * * * * * *

(Subdivisions (3), (4) and (5) are covenants concerning escrowing of agreement, possession of property and other matters not material to issues herein, and are not copied herein.)

* * * * * * * * * * *

(6) The Purchaser shall remit to said bank, to the order and credit of the Vendor, as royalty, twenty-five (25%) per cent of the gross furnace or reduction works returns upon all ores or concentrates extracted and sold from said premises during the term hereof, the payment thereof to be made in each case within ten days after the receipt of returns thereon, and to be accompanied by duplicate smelter or mill returns, and which sum or sums so remitted shall be credited upon the purchase price

of said premises and upon the next payment to fall due thereon.

* * * * * * * * * * *

(Subdivisions (7), (8), (9), (10) and (11) cover provisions and covenants of said contract not material to issues [259] herein, and are not copied.)

* * * * * * * * * * *

(12) It being further agreed that the Purchaser shall at all times during the life of this agreement pay to the Vendor the sum of One Hundred Fifty Dollars ($150.00) per month beginning on the 10th day of December, 1926, and monthly thereafter on the 10th of each month, which said amount shall constitute a payment upon the purchase price, and such sums as shall be paid deducted from the payment next due.

* * * * * * * * * * *

(Subdivision (13) covers provisions and covenants of said contract not material to issues herein, and is not copied.)

* * * * * * * * * * *

(14) It is understood and agreed by and between the parties hereto that if the Purchaser, his heirs, executors, administrators or assigns, shall fail, neglect or refuse to make such payments, or any one or more of them, as hereinabove provided, or shall fail, neglect or refuse to otherwise comply with any of the terms and conditions of this agreement, then he or they shall, at the option of the Vendor, forfeit his or their right to purchase said premises and his or their right to the possession thereof, and shall upon demand deliver up immediate possession of said premises to the Vendor, and shall also forfeit as liquidated damages for

such failure, neglect or refusal, all payments less than the whole of said purchase price theretofore made under this agreement; and

(15) It is further understood and agreed by and between the parties hereto that this agreement is an option from the Vendor to the Purchaser, his heirs, executors, administrators and assigns, and that he and they shall not be subject to any [260] liability for his or their failure, neglect or refusal to comply with any of the provisions, terms and conditions hereof, except as is hereinbefore in the last preceding section provided; and that this agreement and every covenant, promise and agreement herein contained shall be binding upon the parties hereto and upon their respective heirs, executors, administrators and assigns; and that the Purchaser may assign this agreement and his assigns shall have all of the rights hereby vested in him subject to the conditions hereinabove contained and subject to such other conditions as may be imposed by him.

(16) It is understood and agreed that this agreement shall be executed in triplicate and that one triplicate original hereof shall be deposited in said Old Dominion Bank at Globe, State of Arizona, for the guidance of the said bank in carrying out the trust herein imposed upon it, and that such triplicate original so deposited in said bank shall serve as the written escrow instructions to said bank hereinabove provided for, or in case said bank refuses to accept such triplicate copy as its guide then the deed hereinbefore mentioned shall be deposited under instructions to said bank to deliver the same upon the payment to it to the credit of the Vendor as hereinbefore specified of the amounts of the purchase price at the times mentioned herein.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals in triplicate on the day and year in this agreement first above written.

WESLEY GOSWICK, (Seal)
Vendor.

L. E. FOSTER, (Seal)
Purchaser.

* * * * * * * * * * *

(Instrument acknowledged by both parties.)

[261]

By stipulation the deed of Albert G. Sanders and Mary E. Sanders to Jessie M. Shute dated December 20, 1920, conveying Globe property known as the Shute home place, was admitted in evidence as Creditor's Exhibit No. 10, said exhibit being a regular form warranty deed dated December 20, 1920, signed by Albert G. Sanders and Mary E. Sanders with separate acknowledgments of said grantors conveying to Jesse M. Shute, the grantee, for a consideration of $10 and other valuable consideration certain property situate, lying and being in block number 45 of East Globe Townsite in the City of Globe, County of Gila and State of Arizona, more particularly described as:

Commencing at the Southeast corner of said Block Number Forty-five (45) of East Globe Townsite and running thence North along the West line of Second Street One Hundred and Thirty-eight (138) feet; thence West parallel with Sycamore Street One Hundred and Two (102) feet; thence South parallel with Second Street, One Hundred and Thirty-eight (138) feet; thence East along the

North line of Sycamore Street One Hundred and Twp (102) feet to the place of beginning.

There is no recitation in said deed that said property is the separate property of Jessie M. Shute, the conveying clause reading as follows: "For and in consideration of the sum of Ten ($10.00) Dollars / and other valuable consideration to them in [262] hand paid by Jessie M. Shute, of the same place, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said Jessie M. Shute that certain lot, piece or parcel of land, etc."

$6.50 in revenue stamps cancelled 1/17/21. G. W. S.

Said instrument being filed and recorded at the request of Geo. W. Shute in Gila County, Arizona, on the 17th day of January, 1921.

By stipulation realty mortgage from G. W. Shute and Jessie M. Shute, his wife, to Mary E. Holmes, as guardian of the person and estate of Helen H. McKillop, an incompetent, covering the Globe property home place dated January 17, 1921, was admitted in evidence as Creditor's Exhibit No. 11. Said Exhibit No. 11 consists of an ordinary form realty mortgage executed by G. W. Shute and Jessie M. Shute, his wife, to Mary E. Holmes as guardian of the person and estate of Helen H. McKillop, an incompetent, the mortgagee, dated January 17, 1921, covering property described as Lots numbers 1, 2, 3, 4, 5 and 6, in Block 45, East Globe Townsite, Gila County, Arizona. Said mortgage is for the

sum of $3500.00 given to secure the payment of a certain promissory note given by G. W. Shute and Jessie Shute dated January 17, 1921, said note being set up in full in said mortgage, as follows:

CREDITOR'S EXHIBIT No. 11.

"3500.00 Globe, Arizona, January 17th, 1921.

THREE YEARS after date, for value received, without grace, I promise to pay to Mary E. Holmes as guardian of the estate of Helen H. McKillop, an incompetent, or order, at The First National Bank, Globe, Arizona, the sum of Thirty-five hundred & 00/100 ($3500.00) Dollars, with interest at the rate of ten per cent (10%) per annum from date until paid, said interest payable quarterly, and ten per cent (10%) additional for attorney's fees, if collected by law or placed in the hands of an attorney for collection. Each party hereto waives presentment for payment, [263] notice of non-payment, protest and notice of protest and diligence in bringing suit against any party hereto, and each party signing this note consents that time of payment may be extended without notice.

(.70 cancelled Revenue Stamps attached.)

(Signed) G. W. SHUTE,
JESSIE M. SHUTE."

Said mortgage was acknowledged January 17, 1921, by G. W. Shute and Jessie M. Shute before H. M. Foster, notary public, Gila County, Arizona, and was recorded in Gila County, Arizona, at the request of Foster & Foster on January 17, 1921.

By stipulation, certified copy of the declaration

of homestead dated June 16, 1928, sworn to by Jessie M. Shute on the same date and filed and recorded at the request of G. W. Shute on the 18th day of June, 1928, was admitted in evidence as Creditor's Exhibit No. 12. Said Exhibit No. 12 is as follows:

CREDITOR'S EXHIBIT No. 12.

"DECLARATION OF HOMESTEAD.

KNOW ALL MEN BY THESE PRESENTS: That I, JESSIE M. SHUTE, being the head of a family consisting of myself and my husband, G. W. Shute, residing in Phoenix, Maricopa County, State of Arizona, and being desirous of holding and availing myself of the provisions of Chapter 1, Title 20, Revised Statutes of Arizona, Civil Code, 1913, entitled 'Homesteads' do hereby declare and show that I am the head of a family as aforesaid and hereby select as a homestead all that certain piece and parcel of land situate, lying and being in the Town of Globe, Gila County, State of Arizona, described as:

That certain piece or parcel of land situate, lying and being in Block 45 of East Globe Townsite in the City of Globe, Gila County, Arizona, described as follows: Commencing at the southeast corner of Block 45, running thence north along the west line of Second Street, 138 feet, thence west parallel with Sycamore Street 102 feet, thence south parallel with Second Street [264] 138 feet, thence east along the north line of Sycamore Street 102 feet to the point of beginning.

That said property is my separate property and has been purchased and acquired by the separate funds of myself and said property stands of record in my name and is of the value of Thirty-five hundred Dollars ($3500.00) all being in one compact body.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 16th day of June, A. D. 1928.

JESSIE M. SHUTE."

(Sworn to by Jessie M. Shute before R. E. Conger, Notary Public, Maricopa County, Arizona, June 16, 1928.)

(Filed and recorded in Gila County, Arizona, at the request of G. W. Shute on June 18, 1928, at 45 minutes past 4 o'clock P. M.)

By stipulation certified copy of the adjudication of bankruptcy filed in the office of the County Recorder of Gila County, Arizona, was admitted in evidence as Creditor's Exhibit No. 13. Said Exhibit 13 is as follows:

CREDITOR'S EXHIBIT No. 13.

(Title of Court and Cause.)

At Phoenix, in said District, on the 17th day of April, A. D. 1928, before Honorable F. C. Jacobs Judge of the said Court in Bankruptcy, the petition of George W. Shute, a lawyer, of Phoenix, Maricopa County, Arizona, that he be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having

been heard and duly considered, the said George W. Shute is hereby declared and adjudged a bankrupt accordingly.

IT IS THEREFORE ORDERED, That said matter be referred to R. W. Smith, Esq., at Phoenix, Arizona, one of the Referees in Bankruptcy of this Court, to take such further proceedings [265] therein as are required by said Acts; and that the said George W. Shute shall attend before said Referee on the 23rd day of April, 1928, at Phoenix, Arizona, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said Bankruptcy.

WITNESS, the Honorable F. C. JACOBS, Judge of the said Court, and the seal thereof, at Phoenix, in said District, on the 17th day of April, A. D. 1928.

[Seal] C. R. McFALL,
Clerk.
By M. R. Malcolm,
Deputy Clerk.

Filed Apr. 17, 1928. C. R. McFall, Clerk. United States District Court for the District of Arizona. By M. R. Malcolm, Deputy Clerk.

Certification of same as being a true copy of order of adjudication and reference in bankruptcy B.–486, Phoenix, George W. Shute, dated June 6, 1928, by the Clerk of the District Court of the United States for the District of Arizona, is attached. Said instrument was filed and recorded in Gila County, Arizona, at the request of Thomas

W. Nealon on the 8th day of June, 1928, at 50 minutes past 11 o'clock A. M. [266]

Mr. NEALON.—We are offering the admissions against interest of Judge Shute.

The COURT.—I understand you are offering certain admissions?

Mr. NEALON.—Yes.

The COURT.—Why not offer the document as to all admissions against interest. Don't you think that I would be able to pick them out in reading the testimony to determine which are admissions against interest? Do you think it is necessary to specify each particular question and answer?

Mr. NEALON.—Of course, if your Honor wants to take it that way—I was trying to follow—

The COURT.—I assume that you introduce the record for the purpose of showing, as you say, admissions against interest. All evidence which is properly to be considered by the Court as admissions against interest, if there are any such, will be considered and it seems to me to pick out this—these certain paragraphs—questions or answers and from the detailed testimony would not add anything to what has already been stated.

Mr. NEALON.—It is only this and if we have that opportunity some time during the trial or after the trial, if your Honor wants it in brief form—We wish to correlate this. It is very difficult for your Honor to pick it out through a whole mass of testimony. In other words, the Hudson car is

one charge. We would like in some manner to point out the relation of one item to another.

The COURT.—All in the world that you have got to do is to give me a little memorandum showing, as you say, a Hudson car, pages so and so.

Mr. NEALON.—Furnish you that some time during the trial?

The COURT.—Yes.

Mr. NEALON.—All right. In that case, I can see no objection. We offer then— [267]

The COURT.—You certainly can't lose anything by it and I don't see that the other side can.

Mr. MOORE.—Your Honor, we were just waiting to make the same suggestion and objection that the Court has. It would be manifestly unfair to offer one question and one answer from a page and skip to something else. It is a connected story as it goes.

Mr. NEALON.—In the other way, it would be a connected story also but we are perfectly willing to do that, if your Honor please. We were trying to get away from any possible objection on the other side in the method of offering.

The COURT.—You know these hearings on an application for discharge, where objections are filed, are not to be heard under the strict rules that govern the trial of jury cases and usually counsel do not stand on technicalities and it seems to me that even though some testimony might be introduced or offered or admitted that would be subject to some technical objection; what you want

to do is to get all of the facts before the court, because the question of good faith is nearly always involved in a case of this character and evidence which might otherwise not be admissible might well be considered in these proceedings.

Mr. NEALON.—Well, then, we offer, in accordance with the suggestion of the Court, all of the admissions against interest contained in the testimony of Judge Shute heretofore taken before the referee.

The COURT.—And with the privilege of pointing out in a memorandum to be furnished by the Court, if you so desire, any particular portions of that testimony.

Mr. NEALON.—That is satisfactory, if your Honor please.

The COURT.—And with the privilege on the part of the opposing counsel of doing likewise as to any explanatory statements made during the examination. [268]

It was stipulated by counsel for bankrupt that a certain letter marked Exhibit 14 for identification offered in evidence by trustee and objecting creditor, was a copy of a letter written by Miss Birdsall to G. W. Shute dated November 23, 1927. That prior to the filing of the conditional sales contract, being Creditor's Exhibit No. 4, negotiations were pending between Judge Shute and Miss Birdsall on behalf of Mr. Mackay, the objecting creditor, over this particular claim, and that Miss Birdsall

(Testimony of W. W. McBride.)

was threatening to sue him and wrote to him to that effect on November 23, 1927.

TESTIMONY OF W. W. McBRIDE, FOR CREDITOR AND TRUSTEE.

(Being Called as a Witness by the Creditor and Trustee.)

(Examination by Mr. NEALON.)

My name is W. W. McBride. I am a special agent for the United States Department of Justice. In such capacity, I have made an investigation in regard to the bankruptcy of George W. Shute. I had interviews with George W. Shute in regard to the same. [269] I could not give you the exact date of these interviews. It would be between about the 19th of November and about the 25th or 6th, 1928. These interviews took place in Judge Shute's office. During the first interview, Special Agent P. E. Reynolds, also of the Department of Justice, was present. I was alone at all the subsequent interviews. At this first meeting with Judge Shute, at his office, I had a conversation with him in regard to a savings account in the First National Bank of Arizona at Phoenix, Arizona, being account No. 19061, in the name of Jessie M. Shute. That conversation was never reduced to writing. During this conversation, Judge Shute was interrogated relative to the source from which this money came covering the savings account of Mrs. Shute. Judge Shute stated that the first $1100.00 of that

(Testimony of W. W. McBride.)

account came largely from his personal earnings and that a portion of that deposit to her account, subsequent to the deposit of the $1100.00, also came from his earnings and that a further portion came from rents realized from certain Globe property held in Mrs. Shute's name. He gave no figures at all as to the amount. He made no definite statements as to the portion. The note of Joseph E. Noble was discussed with Judge Shute on this occasion. Judge Shute stated that Joseph E. Noble, who was a friend and acquaintance of some years of both he and Mrs. Shute, came to him and advised with him—that it was necessary that he have a certain amount of money and that he suggested that Mrs. Shute had a savings account and that if he would take the matter up with Mrs. Shute he probably would be able to obtain the money and that, pursuant to his suggestion to Mr. Noble, Mr. Noble went personally to Mrs. Shute and took the matter up with her, requesting the loan, and that Mrs. Shute consented to the loan and authorized Judge Shute to make the loan, with the understanding that in the event that the loan was not paid by Mr. Noble when due that the bank—the First National Bank of Arizona would be paid out of her savings [270] account. He did not tell me how that note was signed. Except he stated—as I remember, he stated that he paid the note but I don't remember the particulars. In fact, I don't believe that he related them. My mind is not very clear on the point of any conversation with him about a pay-

(Testimony of W. W. McBride.)

ment to Leslie Creed from that same account. I don't remember of that point being discussed. If so, it was very little and merely a suggestion that the loan had been made by Mr. Shute but I don't remember definitely. On this occasion, a contract or agreement with one Wesley Goswick was discussed in considerable detail. I discussed the matter, asking Judge Shute just what part he played in this transaction with respect to the sale of the mining property by Goswick to L. E. Foster of the Tonto Mining Company. Judge Shute stated that he had handled the papers; that he had not drawn the contract but that he had reviewed the contract, which had been drawn by other parties, and had passed on it and had handled that for Mr. Goswick and that because of his work in connection with that and because of certain courtesies which he had shown to Mr. Goswick in times past and because of the long standing friendship existing between them that Mr. Goswick gave him, as a gift, a portion of the contract price, which approximated 10% thereof. Judge Shute stated that he had received—interrogated as to the amounts that he had received—admitted that he had received these amounts approximately but stated that they were gifts. He also stated that he had recently, acting as the agent and attorney for Mr. Goswick, drawn up an extension of time covering the last payment on this contract, amounting to $82,500.00, stating that the provision of this agreement, which, as I understood, at that time had not been com-

(Testimony of W. W. McBride.)

pleted, that is, had not been accepted but it was in the period of negotiation, provided for a payment of $7500.00 per month, beginning on the 8th day of December, and that amount paid on the 8th day of each month thereafter until the entire amount of [271] $82,500.00 had been paid. I think that Judge Shute had the agreement before him but I am a little uncertain about that. Anyway, upon being interrogated relative to the terms of the contract, Judge Shute stated that the terms of the contract provided for the sale thereof in the amount of $200,000.00, to be paid in five installments, $5,000.00 upon the execution of the contract, which was on December 6, 19—December 8, 1926; $10,000.00 on June 8, 1927; $20,000.00 on December 8, 1927; $82,500.00 on June 8, 1928, and $82,500.00 on December 8, 1928. He stated that all payments, except the last one, had been made and that it was in connection with the last payment that this extension of time was being effected. He also stated that the last payment received by him from Goswick was $8,000.00, which had been received on the 8th day of June, 1927—paid in cash and, as I stated before, Judge Shute stated that this was a gift and not pursuant to any contract. As I understood him —my mind is just a little hazy on that point but my understanding was that the last payment was $8,000.00 on June 8, 1928; the payment immediately preceding that was $2,000.00 on December 31, 1927, and, as I remember, a thousand dollars on June 8, 1927, but I am not certain about the first payment.

(Testimony of W. W. McBride.)

This subject was brought up at a subsequent interview with Judge Shute. At the first interview, Judge Shute stated that he had received on June 8, 1928, the sum of $8,000.00 in cash. At the second interview, I interrogated him relative to the disposition made of the $8,000.00 and he advised at that time that he had a portion of that in the safe there in the office of the firm of Armstrong, Lewis & Kramer and I asked him if he would exhibit the amount that he had and he said he would and proceeded to the safe and displayed to me in bills an amount which appeared to be $2500.00. I know we counted it rather roughly and decided it was $2500.00. He stated that he had expended the other portion of the $8,000.00 for meeting certain obligations of various nature, not detailing, of course, [272] the manner in which it was expended but he stated that that was the balance. It was my understanding that those were for debts; that he had paid certain outstanding obligations of various character with the other portion. That particular point was brought up at the second interview. I did not interrogate him relative to the disposition of the $8,000.00 at the first interview. I am a little in doubt now whether there was a third interview. There may have been but I don't remember anything. I think probably there was a third interview and I think I interrogated him relative to his interest in the firm and interest in the firm equipment, etc., and at that time he gave me certain figures with respect to his interest in the firm and

(Testimony of W. W. McBride.)

equipment. In one of these interviews I was discussing the matter with Judge Shute of his making an arrangement or settlement of some kind between Wesley Goswick and Mr. Packard in regard to some dispute about this property. I asked him just what the arrangement was and he advised that some time after the execution of the original contract between Goswick and L. E. Foster that there had been some little friction or disagreement between Mrs. Packard and Mr. Packard and Mr. Goswick over the contract. I don't think he stated just what that difficulty was but, at any rate, there was some misunderstanding that they were trying to iron out; that he, having been a friend of both parties, having acted as legal advisor in various capacities, was selected to discuss the matter and effect an adjustment between the parties and that he visited Mr. Packard and the substance of his conversation was this; it seemed that a man by the name of Henderson—Jess Henderson, who is also a son-in-law of Goswick and a brother-in-law of Packard, claimed to have an interest of $50,000.00 in the contract price of this property, claiming to have effected the sale, with the understanding that he would receive all over $150,000.00, the contract price being $200,000.00. That would leave $50,000.00. So, in this conference [273] with Packard, he said, "Now you claim, referring—" speaking to Packard—"You claim that Henderson is entitled to $50,000.00. Therefore, you have no interest in that. Therefore, we will deduct the $50,-

(Testimony of W. W. McBride.)

000.00 from the $200,000.00, which leaves $150,000.00. Now, you claim that I am entitled to $20,000.00. Therefore, you have no interest in that. We will deduct that from the $150,000.00, leaving $130,000.00. In other words, $130,000.00 is all that you claim an interest in, claiming a one-half interest in $130,000.00. Therefore, will you agree to dividing the $130,000.00 equally between you?'' Judge Shute stated that William Packard accepted that proposition, $65,000.00 or 50% of the $130,000.00, which was the balance after deducting the $50,000.00, [274] which Packard claimed was due Henderson, and the $20,000.00 which Packard claimed was due Judge Shute in connection with the contract. I have a piece of paper here upon which Judge Shute placed, in his own handwriting with lead pencil, the figures describing the interview which he had with Packard. I will produce that paper. These figures were made in my presence.

Thereupon, life insurance policy of G. W. Shute No. 3310053, Mutual Life Insurance Company of New York, requested by the trustee to be produced in court, was produced by counsel for bankrupt and offered and received in evidence without objection. By order of the court it was not filed, and thereafter it was stipulated between counsel that said policy showed on its face that the cash surrender value thereof on April 17, 1928, was $746.85, and that Judge Shute could change the beneficiary on the policy.

Thereupon it was stipulated by counsel that receipt signed by G. W. Shute given to Thomas W.

(Testimony of W. W. McBride.)

Nealon, the trustee, on August 1, 1928, covering said policy of insurance, said policy having been delivered to said bankrupt by said trustee so that Judge Shute might obtain a loan thereon and retain his policy, was admitted in evidence as Creditor's Exhibit No. 15.

TESTIMONY OF W. W. McBRIDE (Continued).

I have before me the paper which was before Judge Shute at that time, upon which appears pencil figures explaining the story that he was telling to me relative to his conference with Mr. Packard. That is the paper to which I referred before lunch in my testimony.

Said paper referred to by witness was then admitted in evidence without objection and by stipulation of counsel a copy of the same made by the witness was substituted for the original. Said document substituted for the original was admitted [275] in evidence as Creditor's Exhibit No. 16, and is as follows:

CREDITOR'S EXHIBIT No. 16.

	50000
	20000
	70000
200000	
70000	
130000	

This is to certify that the above is a true and exact copy of the original memorandum which was made in my presence by George W. Shute, and in

(Testimony of W. W. McBride.)

connection with which I testified in hearing on application for discharge, on January 9, 1929.

W. W. McBRIDE.

W. W. McBRIDE,

Special Agent, U. S. Department of Justice.

[276]

I don't remember at this time or subsequently having any further talk with Judge Shute about this Goswick matter, other than that which I have already testified. There may possibly have been some detail that I have overlooked but I don't remember that at this time. I don't remember that I testified to a matter of his having received $8,000.00. I think it appears in the record. The information—similar information was obtained by the trustee and displayed to me in connection with the matter. I would say that it was possibly in the late afternoon of the same day that I had the conference with Mr. Shute. I could not tell you the day of the week. It was before Thanksgiving. I left Phoenix on the evening of November 27 at 10:10 P. M. And it was a short time prior to that. Just within a day or two prior to November 27, 1928. The matter of the Globe property,—the home—what is known as the Shute home over there—was discussed with Mr. Shute during our interview. That was at the first interview. I first asked Judge Shute what the—as I remember—what the valuation of the Globe property was and he stated that he thought probably about $5,000.00 and then I questioned him regarding the title and the ownership of this property and he stated that this property was in Mrs. Shute's name and that both he and Mrs. Shute regarded that as

(Testimony of W. W. McBride.)

her separate estate. Then, I interrogated him relative to the origin, that is, the source from which he obtained title. In other words, I wanted to determine just on what ground he contended that this was her separate estate. Prior to that, I had read, of course, the hearings that had taken place before the referee in bankruptcy. In that hearing, it stated there that Mrs. Shute had formerly owned property at Prescott, Arizona, and that through a series of transactions this Globe property arose as the result of that. In other words, she obtained this by virtue of property which she owned at Prescott and which was sold. That was the impression that I obtained from reading the hearing before the [277] referee in bankruptcy. Therefore, I was interrogating him with respect to the origin of the title and Judge Shute stated at that time that—stated the circumstances under which she obtained title to the property and why they regarded that as her separate estate and in so doing stated that at one time some time prior to the purchase of this property that he had sold certain property which I thought—which I regarded as community property—and without her permission—and as the result of it there was some little disagreement—some misunderstanding in the home regarding that and Mrs. Shute stated that—as I remember, she returned to her home up in Prescott and stated that she would return when she had a place—home in which to live and that Judge Shute purchased this home—had it placed in her name and that they regarded that as her property by virtue of the agreement between her and Mr. Shute, which agreement was inspired

(Testimony of W. W. McBride.)

by the former sale of this other property, which was sold without her consent. The point was not discussed as to whether the property sold at Prescott was her separate property, but I merely asked him with respect to that and then he based title to this property on the grounds that I just suggested, stating that he regarded it as her property, for the reasons that I have just stated, not because of the Globe property or the Prescott. I don't believe it was discussed about in whose name the Prescott property stood at that time. I don't think there was at subsequent interviews any further reference to this property. I don't remember of any further discussion on that point. I asked Mr. Shute if he purchased this Essex coach for his wife and he stated that he did. That is about the only discussion on that point. He merely stated that he had purchased it and, as I remember, turned in an old Essex car that she had at that time as part payment. I never discussed with him in regard to a check given to the A. E. England Motor Company for $995.00. I had a discussion with him in regard to a $250.00 item that had been [278] paid to Arthur La Prade. As I remember, Arthur La Prade was a friend of Judge Shute and that he had come to him some time prior to the payment of this check and advised that he had in mind certain investments in the State of Louisiana in connection with leases and advised Judge Shute that it appeared to be a good investment and solicited him for the sum of $250.00 to purchase those leases with and that subsequent to the filing of the petition in bankruptcy in this case Mr. La Prade came to Judge Shute and

(Testimony of W. W. McBride.)

stated that he had noted that he had gone into bankruptcy and that he felt that he was in part responsible for the loss which had been sustained as the result of investment in this property, which turned out to be a poor investment, and, therefore, gave Judge Shute $250.00, representing the $250.00 which he had obtained from Judge Shute for the purpose of investing in the Louisiana leases. I asked Judge Shute if such and such a day he purchased a phonograph for the home and he stated that he did. I think it was near Christmas time of 1927, as I remember. It may possibly have been '26 but I believe it was 1927. For the sum of $365.00. Nothing further was said about that except that he had the phonograph at his home. I don't remember whether I first discussed the savings account with Judge Shute or not but I remember very well the conversation with respect to the savings account and that was that the first $1100.00 which was deposited by Mrs. Shute was largely from his earnings and that certain portions of this savings account that were deposited subsequent to the deposit of the $1100.00 came from his earnings and from rents from the Globe property. As I remember, the matter of the withdrawal of that fund subsequent to the institution of proceedings in bankruptcy was not discussed in detail but it does seem to me that Judge Shute stated that Mrs. Shute had withdrawn on advice of counsel the sum of a thousand dollars. I think he stated that Mrs. Shute had consulted some lawyer up in Globe, whose name I don't remember just now, but there was very [279] little discussion on it. I think it was just mentioned. He did

(Testimony of W. W. McBride.)

not say anything about any conference himself with this lawyer. I think his income tax return for the year 1927 was discussed briefly and, as I remember, his response to that was that one of the girls in the office had prepared the income tax and had—and that he being busy with other duties and feeling that she was capable of handling those things probably he had not paid as much attention to it as he should have done when it was filed—some statement there similar to that. I have seen the copy of the income tax return for 1927. I observed the item contained therein about the receipt of a thousand dollars from Wesley Goswick for commission. I think the only explanation he made in regard to that particular item was that given with respect to the income tax return, that it was prepared by the girl in the office and that he, perhaps, had not examined it as carefully as he should have done. I asked him if he had sworn to it and he stated that he had; that that was his but that he probably had not examined it as carefully as he should have done. We discussed at length about an admission of a $2,000.00 payment received from Mr. Goswick. I interrogated him relative to a deposit that was placed in the bank, as I remember, on the 31st day of December, 1927, of $1900.00, showing at the time that the deposit was made that there was a $100.00 withdrawal, that is, that there was $1900.00 deposited and probably a hundred dollars that was placed in his pocket, indicating that this deposit was a check rather than cash. I interrogated him relative to that and his mind was hazy on it and was uncertain and thought that perhaps that was not correct but subsequently he looked up his deposit account and

(Testimony of W. W. McBride.)

then refreshed his memory and stated that this was $2,000.00 which he had received from Mr. Goswick and that his book showed a deposit of $1900.00. As to the deductions made in that income tax return—his own income tax return for depreciation on the Globe property — that was perhaps [280] discussed a little but very little, if any, and it rather appears to me that Judge Shute stated at that time that the girl in fixing—in preparing this return, decided that by splitting these various items, placing half on his and half on hers—I don't remember the purpose for which that was done but there was splitting of these various items between the two—between Mrs. Shute's return and his but I don't recall the exact reason why the girl made that division. I am referring now to a division of one-half of the depreciation on the Globe home property. And one-half of it was returned as community property. I called his attention to the fact that that appeared also in Mrs. Shute's return. I don't believe that in discussing that we went into detail and attempted to segregate the different items, except that there was merely a short discussion with respect to the fact that there was a division of this which they had regarded as community property, half on his and half on hers and, as I remember, that was the explanation but I don't just remember why he stated that it was there divided. There was no discussion between us of the income tax return for 1926 for the reason that I had not examined one. I knew nothing about what the 1926 or anything prior to this 1927 contained. Therefore, there was no mention of it. The same would apply to 1925 and anything prior to that time. There was a dis-

(Testimony of W. W. McBride.)

cussion in my interview with him in regard to the payment of a sum of $10,000.00 to him by C. C. Julian. Judge Shute stated that a man by the name of either Landauer or Bandauer, who was an employee of C. C. Julian, came to him and solicited his influence in effecting a sale of certain mining stock by a certain party, whose name I don't remember, to C. C. Julian. In other words, Julian wanted to purchase this property and I assumed that Judge Shute was standing in an advantageous position to effect that sale and, therefore, Landauer or Bandauer, who is an employee of Julian, came to Judge Shute and solicited his support in influencing the other party to consent to [281] the sale and that the sale was effected; that Julian gave Judge Shute $10,000.00, which $10,000.00 was divided equally between him and Landauer. I could not tell you whether the money was paid in currency or otherwise. There was this issue that was raised but the only thing, probably, that was said with respect to that item was that there was a $3,000.00 check paid to Mrs. Holmes, the mortgagee, on the Globe property, which could not hardly be accounted for from the bank records. In other words, it could not be determined where this $3,000.00 was secured from. In other words, his earnings from the firm which had been deposited in the bank did not show that this amount had been withdrawn from that and I think, as I remember, it was with respect to that one point and then Judge Shute told the full story voluntarily without any further interrogation relative to that point, because I did not know the details of the transaction at all. That was the Ezra B.

(Testimony of W. W. McBride.)

Thayer deal with C. C. Julian. I don't remember as to whether I had information prior to this interview of $3400.00 being deposited in the bank which was not accounted for through earnings from the firm and that deposit was in cash. Prior to the interview with Judge Shute I had had an interview with Wesley Goswick in regard to a contract existing between him and Judge Shute for the payment of money.

Mr. NEALON.—Q. I will ask you if you had any interview with Mr. Wedepohl of the A. E. England Motor Company about a Hudson car placed there by Judge Shute shortly prior to the bankruptcy?

A. Yes, sir.

Mr. MOORE.—We object to that question on the same ground, your Honor, unless it is shown that Judge Shute was present.

Mr. NEALON.—Now, this is a little different ground, if your Honor please.

The COURT.—You are assuming a fact in the question that has not been proven. [282]

Mr. NEALON.—What is that, your Honor?

The COURT.—I say, you assume a fact in your question which has not yet been proven.

Mr. NEALON.—Judge Shute has admitted that he put the car in England's place just prior to the bankruptcy. That appears in his testimony given before the referee.

The COURT.—Well, of course, you may be correct about that but any conversation alleged to have taken place between this witness and some third person would not be admissible in bankruptcy.

(Testimony of W. W. McBride.)

Mr. NEALON.—No, I am not trying to get that. What I was trying to find out if this witness had ascertained in any way from an employee of the company whereabouts in that building that car was placed.

The COURT.—If he saw the car, he may state.

Mr. NEALON.—What is it?

The COURT.—If he saw the car there, he may so state.

Mr. NEALON.—Q. You did not see the car?

A. No, the car was removed before this investigation was instituted.

The COURT.—How do you know that?

A. Just judging from the reading of the hearings before the referee in bankruptcy.

Mr. NEALON.—Q. You had read the testimony of Judge Shute prior to that time?

A. I had read all of the testimony of all the hearings that had been held prior to the time that the Government instituted this investigation.

Prior to the time that I went to see Judge Shute, I had an interview with Mr. Goswick, and prior to the time that I went to see Judge Shute, I had had an interview with Mr. Packard. I would say it was just about two or three days prior to my interview with Judge Shute. That might not be exact but it was very [283] shortly thereafter. I had a discussion with Judge Shute about the Hudson car being placed in the A. E. England Motor Company's place. He said it had been placed there. I don't believe Judge Shute told me in what part of the building it had been placed. I obtained the in-

(Testimony of W. W. McBride.)

formation but from another source. I did not, in my interview with Judge Shute, convey to him the information that I had obtained from Mr. Goswick in regard to this $200,000.00 deal. I did not convey to him any information that I had gotten in regard to my interview with Mr. Packard. I did not know what impression I gave him but I did not tell him that I had such information.

Cross-examination by Mr. MOORE.

It seems to me that it was Clifford Matthews whom Judge Shute told me had been employed by Mrs. Shute to look after her affairs, and that Clifford Matthews, an attorney in Globe, had advised her to withdraw these funds from the bank. It is my impression that Judge Shute told me that he had bought that phonograph for Mrs. Shute for a Christmas present. In connection with the La Prade transaction covering the $250.00, I think Judge Shute told me that Mr. La Prade had come to his office and introduced to him an old friend of La Prade's, whose honesty and integrity La Prade said he would vouch for, and which friend had some oil leases down in Louisiana, and that Judge Shute would get a fair run for his money. I think he told me that it subsequently developed that this friend, as a matter of fact, did not have any oil leases at all. My understanding was that La Prade fel*d* that he had been the cause of him losing the $250.00 and, in view of the fact he was now in difficulty he was coming back as a friend to his rescue—he felt some responsibility in returning the $250.00. It was my understanding — impression that he handled the

(Testimony of W. W. McBride.)

transaction with regard to the Noble note himself, with the permission and consent [284] of Mrs. Shute. He told me it was paid out of the savings account, that is clear. The only thing was whether he paid it for her. I got the impression that he handled it as her agent. When we discussed the Goswick transaction or matter, he also told me of a previous contract which he had himself negotiated for the sale of the same property to some Ohio people, who were represented by Stalker and Bedford. As I remember, he stated that he had handled a transaction involving the sale of this same property at some time prior to the transaction between Goswick and L. E. Foster and that it was specifically provided in that that he was to receive 10% for his services but that they failed to exercise the option and, therefore, this transaction fell through. I don't remember that he also told me that the Stalker and Bedford people had expended a large sum of money in the construction of roads and building houses and installing machinery on the property, which was left on the property when they threw up the option. I remember that after Judge Shute started to relate the Julian transaction there was absolutely no interruption. He told the entire story in entirety, without being interrogated relative to that feature by me. As I remember, I was in doubt as to the origin of the $3,000.00 check, that is, the source from which this $3,000.00 check came, with which Judge Shute paid Mary Holmes, the mortgagee on the Globe property, and just immediately preceding that I interrogated him relative to that point. I interrogated him with refer-

(Testimony of W. W. McBride.)

ence to the source from which the $3,000.00 came from and Judge Shute immediately thereafter told the entire story about the Julian transaction without interruption on my part. I had seen this $3,000.00 item from the bank records. I am not clear as to whether I had also observed the $3400.00 deposit from the bank's records. Mr. Nealon questioned me on that point and I don't remember. I examined the records both in the hands of the trustee and at the banking institution too. I examined all records that [285] was furnished them and also went to the bank personally and examined, at least in part, the records over there. The day that I went to the bank, there was one sheet that they could not find and they claimed they searched for two days for this sheet, which left a missing link, which made a discrepancy between the figures which I had prior thereto and the figures that I had had and they never did discover it. I went back and made inquiry about it and they claimed that apparently it had been misplaced and could not be found, so that I could not get any check between the two. I don't know whether that missing sheet was found among the records that Judge Shute furnished to the trustee. I never found it. I never seen that sheet but the bank, apparently, did not know what had become of it, because they stated that they had made diligent effort and had been unable to find the record of that particular sheet. I think probably the first suggestion with regard to the Goswick transaction came as the result of the hearings before the referee. I did not attend those hearings. I obtained it from the trustee in bankruptcy. I came over and made an examination of

(Testimony of W. W. McBride.)

it myself. I received absolutely no correspondence —no advance information prior to starting the investigation myself, with the exception of one short report that was made by a prior agent merely to the effect that Judge Shute had filed a petition in bankruptcy and filed his original schedule. I think, probably, after examining the hearing before the trustee, that I might have mentioned that transaction to Judge Nealon afterwards but, after making an investigation of it, there was no disclosure made with respect to any information I obtained, except with respect to one point upon which I first obtained prior approval from the Attorney General. That was treated as confidential information. I would say that, with the exception of just mentioning—just checking a little bit from the information obtained in the hearing before the referee in bankruptcy that I did not discuss it with Mr. Nealon [286] until after I had discussed it with Judge Shute, with that exception, because I knew nothing about the transaction, except what was shown therein.

Q. And you went to Judge Shute about it before you went to the trustee?

A. After I had made my investigation—

Q. I am speaking about after you had seen it in the records in the referee's office; to whom did you go first?

A. I think, probably, after obtaining that vague information, before I made my investigation on the point, that I did question Mr. Nealon with respect to that point.

(Testimony of W. W. McBride.)

Q. And Mr. Nealon at that time told you that he had discussed the matter with Judge Shute, did he not?

A. He did not. I don't believe that Mr. Nealon at that time had the detailed information on it. If he did, he did not furnish it to me.

Redirect Examination by Mr. NEALON.

Mr. Moore has mentioned about the Noble note having been paid from the savings fund. I examined the income tax return in regard to that feature, in 1927—I mean the deduction of that. It was deducted from Judge Shute's account, as a loss by him.

Mr. NEALON.—I want to introduce some exhibits, if your Honor please, I now offer the income tax return for the year 1925, the copy furnished me, and which, under the stipulation, as I understand it, Mr. Moore, was to be received as an original.

Mr. MOORE.—No objection.

Mr. NEALON.—Now, I will also offer this sheet, which contains the account for 1926 of G. W. Shute; also of Mrs. G. W. Shute.

Mr. MOORE.—No objection. [287]

Whereupon Creditor's Exhibits Nos. 17 and 18 were admitted in evidence without objection, as follows: [288]

CREDITOR'S EXHIBIT No. 17.

Form 1040.

INDIVIDUAL INCOME TAX RETURN.

For Calendar Year 1925.

G. W. Shute,

309 National Bank of Arizona Bldg.,

Phoenix, Maricopa (County) Arizona.

Occupation, Profession, or Kind of Business—Lawyer.

1. Are you a citizen or resident of the United States? Yes.
2. If you filed a return for 1924, to what Collector's office was it sent? Phoenix, Arizona.
3. Is this a joint return of husband and wife? Yes.

* * * * * * * * * * *

5. Were you married and living with husband or wife on the last day of your taxable year? Yes.

* * * * * * * * * * *

7. If your status in respect to questions 5 and 6 changed during the year, state date of such change. Status unchanged. [289]

* * * * * * * * * * *

INCOME.

1. Salaries, Wages, Commissions, etc. ....NONE
2. Net profit from Business or Profession. (From Schedule A.) See 4 below ...NONE
3. Interest on Bank Deposits, Corporation

Bonds, etc. (except interest upon which an income tax of 2% was paid at source). .....NONE

* * * * * * * * * * *

4. Income from Partnerships, Fiduciaries, etc., Armstrong, Lewis & Kramer, Phoenix, Arizona 6,830.18
5. Rents and Royalties (From Schedule B.) 56.50

* * * * * * * * * * *

10. Total Income in Items 1 to 9.....6,866.68

DEDUCTIONS.

11. Interest Paid 590.00
12. Taxes Paid (Explain in Schedule F.) .. 97.69

* * * * * * * * * * *

17. Total Deductions in Items 11 to 16 .. 687.69

18. Net Income (Item 10 minus Item 17) .6,198.99

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES.

1. Kind of Property	2. Amount Received	3. Cost***	5. Depreciation	6. Repairs	**8. Net Profit
Dwelling house at Globe rented	564.00	6500.00	325.00	100.00	139.00
Professional Library	57.50	1400.00	140.00		

* * * * * * * * * * *

EXPLANATIAN OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B.

1. Kind of Property ***	5. Cost ***	8. Amount of Depreciation Charged Off This Year
Frame Dwelling House at Globe rented	6500.00	325.00
Professional Library	1400.00	140.00

[290]

CREDITOR'S EXHIBIT No. 18.

Form 1040.

INDIVIDUAL INCOME TAX RETURN,
For Calendar Year 1926.
G. W. Shute,
309 N. Ba. Bldg.,
Phx.

1. Are you a citizen or resident of the United States? Yes.
2. If you filed a return for 1925, to what Collector's office was it sent? Phx., Ariz.
3. Is this a joint return of husband and wife? No.
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent. Mrs. G. W. Shute, Phx., Ariz.
5. Were you married and living with husband or wife on the last day of your taxable year? Yes.

* * * * * * * * * * *

7. If your status in respect to questions 5 and 6

changed during the year, state date of such change. No.

8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? None.

INCOME.

* * * * * * * * * * *

4. Income from Partnerships, Fiduciaries, etc. A. L. & K. ½ Community 3897.78

* * * * * * * * * * *

9. Other Income (including dividends received on stock of foreign corporations) J. W. Bandhauer—Ajo (½ Community) 2500

* * * * * * * * * * *

10. Total Income in Items 1 to 9 .....6347.78

DEDUCTIONS.

11. Interest Paid 172.13

12. Taxes Paid (Explain in Schedule F.) 97.80

[291]

* * * * * * * * * * *

16. Other Deductions Authorized by Law.

(a) Dep. on Professional —10%.

(b) 280 volumes Cyc. 5.00 —$1400 .....140.00

17. Total Deductions in Items 11 to 16 .....409.93

18. Net Income (Item 10 minus Item 17) 5937.85

COMPUTATION OF TAX.

19. Earned Net Income 6347.78

20. Less Personal exemption and Credit for Dependents (see Instruction 20) 3500

21. Balance (Item 19 minus 20) .2847.78

22. Amount taxable at 1½% (not over the first $4000 of Item 21) 2847.78

* * * * * * * * * * *

25. Normal Tax (1½% of Item 22) 42.71

* * * * * * * * * * *

29. Tax on Earned Net Income (total of Items 25, 26, 27, and 28) 42.71

30. Credit of 25% of Item 29

(not over 25% of Items 28, 42, 43, and 44) 10.68

31. Net Income (Item 18 above) 5937.85

* * * * * * * * * * *

35. Credit for Dependents.3500

36. Total of Items 32, 33, 34, and 35 3500

37. Balance (Item 31 minus 36).2437.85

38. Amount taxable at 1½% (not over $4,000 of Item 37) ..2437.85

* * * * * * * * * * *

42. Normal Tax (1½% of Item 38) 36.55

* * * * * * * * * * *

46. Tax on Net Income (total of Items 42, 43, 44 and 45).36.55

47. Less Credit of 25% of Tax on Earned Net Income (Item 30) 9.14

48. Balance (Item 46 minus 47)..27.41

* * * * * * * * * * *

53. Balance of Tax (Item 50 minus Items 51 and 52).....27.41

97.71

28.21

125.92 [292]

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES.

1. Kind of Property	2. Amount Received	** 5. Depreciation	6. Repairs	** 8. Net Profit
Dwelling house at Globe	...400.00	325.00	175.00	(100)
			½ Comm.	(50)

* * * * * * * * * * *

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, and 15.

Taxes

Co. Taxes—Gila Co.—152 60

Auto Taxes 43

195 60—½Community 97.80

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B.

1. Kind of Property	*** 5. Cost	*** Amount of Depreciation 7. Previous Years	Charged Off 8. This Year
Dwelling house at Globe rented	6500	325	325
Professional Library	1400	140	140

Form 1040.

INDIVIDUAL INCOME TAX RETURN.

For Calendar Year 1926.

Mrs. G. W. Shute,
309 NBA. Bldg.,

* * * * * * * * * * *

4. Income from Partnerships, Fiduciaries, etc. A. L. & K. (½ Community) 3897.77
5. Rents and Royalties (From Schedule B.) .....(50–)

* * * * * * * * * * *

9. Other Income (including dividends received on stock of foreign corporations)
(a) J. W. Bandhauer (½ Community) 2500

* * * * * * * * * * *

10. Total Income in Items 1 to 9 .... 6347.77

DEDUCTIONS.

11. Interest Paid 172.12
12. Taxes Paid (Explain in Schedule F) 97.80

* * * * * * * * * * *

[293]

17. Total Deductions in Items 11 to 16 ..... 269.92

18. Net Income (Item 10 minus Item 17) 6077.85

COMPUTATION OF TAX.

19.	Earned Net Income (not over $20,000)	5000	
20.	Less Personal Exemption and Credit for Dependents (see Instruction 20)		
21.	Balance (Item 19 minus 20)...	5000	
22.	Amount taxable at 1½% (not over the first $4,000 of Item 21)	4000	
23.	Amount taxable at 3% (not over the second $4,000 of Item 21)	1000	
*	* * * * * * * * * * *		
25.	Normal Tax (1½% of Item 22)		60
26.	Normal Tax (3% of Item 23)..		30
*	* * * * * * * * * * *		
29.	Tax on Earned Net Income (total of Items 25, 26, 27, and 28)		90
30.	Credit of 25% of Item 29 (not over 25% of Items 28, 42, 43, and 44)		22 50

31. Net Income (Item 18 above) 6077 85

* * * * * * * * * * *

37. Balance (Item 31 minus 36) .6077 85

38. Amount taxable at 1½% (not over the first $4,000 of Item 37) 2000

* * * * * * * * * * *

39. Balance (Item 37 minus 38) .2077 85

* * * * * * * * * * *

42. Normal Tax (1½% of Item 38) 60 00

43. Normal Tax (3% of Item 40) 62 34

* * * * * * * * * * *

46. Tax on Net Income (total of Items 42, 43, 44, and 45)...122 34

47. Less Credit of 25% of Tax on Earned Net Income (Item 30) 22 50

48. Balance (Item 46 minus 47) ..9984

* * * * * * * * * * *

[294]

50. Total Tax (total of or difference between Items 48 and 49) 99 84

* * * * * * * * * * *

53. Balance of Tax (Item 50 minus Items 51 and 52)....99 84

[295]

It was then stipulated that copies of income tax returns for the year 1927 which were attached to testimony of the bankrupt given in the Referee's Court were admitted in evidence as originals.

Thereupon Creditor's Exhibit No. 19 was admitted in evidence without objection, as follows:

[296]

CREDITOR'S EXHIBIT No. 19.

Phoenix, Arizona, Dec. 3, 1927. No. 548.

G. W. Shute—Pay to the order of A. E. England ..... $995.00.

Nine Hundred Ninety-five no/100 Dollars.

G. W. SHUTE.

(Back)

Pay to the Order of THE NATIONAL BANK OF ARIZONA, Phoenix, Arizona.

A. E. ENGLAND.

(Perforated)

(Rubber Stamp)

The National Bank

1

Jan. 3, 1928

of Arizona.

Thereupon Creditor's Exhibit No. 20 was admitted in evidence without objection, as follows:

CREDITOR'S EXHIBIT No. 20.

Phoenix, Arizona, Dec. 19, 1927. No. 545.

G. W. Shute—Pay to the order of Arthur La Prade ..... $250.00.

Two Hundred fifty no/100 Dollars.

G. W. SHUTE.

(Back)

Pay to Arthur T. La Prade, Trustee a/c only.

ARTHUR T. La PRADE.

By G. W. CORNELIUS.

[297]

(Rubber Stamp)
The Valley Bank,
Phoenix, Ariz.
Through Clearings
Dec. 21, 1927.
(Perforated.)

Thereupon Creditor's Exhibit No. 21 was admitted in evidence without objection, as follows:

CREDITOR'S EXHIBIT No. 21.

ARTICLES OF CO-PARTNERSHIP.

THIS AGREEMENT made this 2nd day of May, 1927, by and between THOS. ARMSTRONG, JR., R. WM. KRAMER, JAMES R. MOORE and G. W. SHUTE and ROBERT H. ARMSTRONG, all of Phoenix, Arizona,

WITNESSETH:

WHEREAS, the parties to this agreement have, with the late Judge Lewis, been for some years

past engaged as partners in the practice of law in Phoenix, Arizona, under the firm name of ARMSTRONG, LEWIS & KRAMER, which co-partnership has recently been dissolved by the death of Judge Lewis, and

WHEREAS, the parties hereto are desirous of continuing such law practice as partners,

Now for the purpose of specifically defining the powers, obligations, rights and duties of each of said partners, and reducing to written form all the agreements of the parties in relation to the matter, it is now, by the parties hereto, agreed as follows:

I.

From and after April 1, 1927, and until December 31, 1932, or so much longer as the parties may agree, each and all of the parties shall be and continue to be co-partners in the practice of law with their principal offices in the City of Phoenix, Arizona, and each will devote his entire time, skill and service to the business of the partnership except that THOS. [298] ARMSTRONG, JR., shall be obliged to give thereto only such time and service as he may elect, but will not engage in the practice of law otherwise than as a member of the partnership during its continuance.

It is expressly understood that R. WM. KRAMER is not expected to do, and is exempted from doing any work for or on behalf of the firm outside the usual office hours.

II.

The Firm Name of the said partnership shall be ARMSTRONG, LEWIS & KRAMER.

III.

Each partner shall furnish for the use of the partnership, his own law library in the office of the firm; such library to remain the property of the partner now owning and furnishing the same. As compensation for the use of the library furnished by each partner, the partnership shall purchase with partnership funds all new volumes of sets of reports such as the West Publishing Company Reporter System, United States Reports, Annotated Sets—Cyclopedias and Digests and additions and supplements to textbooks, as well as annotations which, when purchased, shall become and remain the property of the partner owning the Base set of Books. The partnership shall purchase for the use of the partnership to be and remain partnership property, such additional textbooks, reports, etc., as may, from time to time, be advantageous. So long as the library of Judge Lewis shall remain in the office for the use of the firm, it shall be kept up as though he were still a member of the firm.

IV.

As to the office furniture and fixtures in the present offices of the firm, of which 23⅓% is owned by the Estate of the late Judge Lewis,—the same being carried on the old firm books as $5,127.59, as of April 1, 1927, and which should be [299] depre-

ciated 25% to arrive at approximately the true value, and therefore of the present value of $3,845.-74. The interest of the Estate of Judge Lewis therein is $897.33. It is agreed that the said interest of Judge Lewis' Estate shall be purchased by the present firm, the members contributing thereto as follows: Thos. Armstrong, Jr., 30% or $269.20, R. Wm. Kramer, 30% or $269.20, James R. Moore 20% or $179.47 and G. W. Shute 20% or $179.47, and thereafter the furniture and fixtures of the present firm will be owned in the following proportions: Thos. Armstrong, Jr., 30%, R. Wm. Kramer, 30%, James R. Moore, 20% and G. W. Shute 20% thereof, and will be so divided on dissolution of the present firm with the right to the survivors or remaining members of the firm to purchase the interest of the retiring member therein, and such retiring member, his administrator or executor will withdraw his library including additions thereto, purchased with partnership funds pursuant to Article III hereof.

V.

The expense of carrying on the business of the co-partnership shall be paid out of the gross earnings.

VI.

The new firm will assume and pay all expenses of the old firm, and in accordance with the Articles of Co-partnership of the old firm, the new firm will continue to conclusion all business commenced prior to April 1, 1927, and collect the earnings therefrom,

and will apportion and distribute the net proceeds thereof from time to time as follows: to Ethel O. Lewis, executrix of the Will of Ernest W. Lewis, 36% thereof, to R. Wm. Kramer 24% thereof, to James R. Moore 15% thereof, to G. W. Shute 15% thereof, and to Thos. Armstrong, Jr., 10% thereof, as provided in the Articles of Co-partnership of the old firm. Such net proceeds will be ascertained by deducting from the gross amounts collected from such business, a proportional expense of [300] carrying on the business from month to month, and such proportion will be ascertained by comparing the monthly collection of cash going to the old firm and that going to the new firm, each firm bearing its proportion of the expenses of carrying on the business based upon the amount of cash collected by each.

VII.

The net earnings of the new firm shall be paid and divided as follows: To R. Wm. Kramer 33%, to James R. Moore 25%, to G. W. Shute 25%, and to Thos. Armstrong, Jr., 17%. Division and payment of the net earnings shall be made monthly or whenever there shall be on hand $1,000.00 or more of the net earnings, not required for the payment of the current month's expenses. It will be the policy of the firm, however, to keep its cash balance in the bank up to at least $1,000 at all times, except that on December 31st of each year the entire net cash balance will be distributed as partnership earnings.

VIII.

A bank account shall be kept in the firm name in the First National Bank of Arizona in which there shall be deposited daily all cash, drafts and checks collected or received on firm account. All withdrawals from the bank shall be made by checks signed by the bookkeeper or cashier for the firm in the firm name and countersigned by a member of the firm. All firm checks shall be consecutively numbered and stubs kept showing date, amount and to whom issued. A bookkeeper shall be employed who shall keep the books of the firm, and the books shall be so kept as to show earnings and expenses, and cash received and disbursed; which account shall be balanced daily, as shall be all credits and charges of clients. The firm's assets and credits shall not be used by any partner for private purposes.

IX.

In case of any disagreement between the members of the [301] firm, as to firm policy, charges for services or any other matter connected with the firm business, the same shall be referred for settlement to Thos. Armstrong, Jr., whose decision thereon shall be final and binding. In the absence of Mr. Armstrong, such reference shall be made to R. Wm. Kramer.

X.

On the death, permanent disability or voluntary withdrawal of either Thos. Armstrong, Jr., R. Wm. Kramer, James R. Moore or G. W. Shute, he or his executor of administrator shall be entitled to have

and receive his percentage of the net earnings of the firm made and earned up to the time of such death, disability or voluntary withdrawal, as shown on the books of the firm, to be paid as the same are collected by the remaining members of the firm. Retainers to be considered as earnings. Any property belonging to the firm shall, on dissolution, be divided as follows: 30% to Thos. Armstrong, Jr., 30% to R. Wm. Kramer, 20% to James R. Moore and 20% to G. W. Shute with the right of the survivors to purchase the interest of the retiring member at its then cash value.

XI.

Robert H. Armstrong is admitted to partnership in the firm, but so long as he continues his employment as assistant County Attorney, he shall receive only a salary of $100 per month. In case of his death or permanent disability, neither he nor his administrator shall be entitled to any share or interest in the firm, or its property, or its earnings collected after the time of such death, disability or withdrawal. He shall not be required to contribute to or keep up the library for the use of the firm.

This agreement shall be binding upon the parties hereto their heirs, executors and administrators.

IN WITNESS WHEREOF we set our hands this 2d of May, 1927. [302]

THOS. ARMSTRONG, Jr.
R. WM. KRAMER.
JAMES R. MOORE.
G. W. SHUTE.
ROBERT H. ARMSTRONG. [303]

Thereupon Creditor's Exhibit No. 22 was admitted in evidence without objection, as follows: [304]

CREDITOR'S EXHIBIT No. 22.

MODIFICATION OF PARTNERSHIP AGREEMENT.

The partnership agreement of Armstrong, Lewis & Kramer dated as of January 1, 1924, as modified on the 17th day of December, 1924, is hereby further modified and amended, as of January 1st, 1924, as follows:

Article III to read as follows:

Each partner shall furnish for the use of the partnership his own library at the office of the firm, said library to remain the property of the partner now owning and furnishing the same. As compensation for the use of the library furnished by each partner, the partnership shall purchase with partnership funds all new volumes of sets of reports, such as the West Publishing Company's Reporter system, United States Reports, and additions and supplements to text books, as well as annotations, which when purchased shall become and remain the property of the partner owning the base set of books. The partnership shall purchase for the use of the partnership, to be and remain partnership property, such additional text books, reports, etc., as may from time to time be deemed advantageous.

Article IV to read as follows:

The office furniture and fixtures in the present

offices of the firm are the property of Armstrong, Lewis & Kramer in [305] equal shares, and are of the value of Three Thousand Dollars ($3,000.00). The incoming partners, Moore and Shute, will each pay to said Armstrong, Lewis & Kramer, fifteen per cent (15%) of such value, and thereafter all office furniture and fixtures and additions thereto will be the property of all the partners in the following named proportions:

Thos. Armstrong, Jr., twenty-three and one-third per cent (23–1/3%); Ernest W. Lewis, twenty-three and one-third per cent (23–1/3%); R. Wm. Kramer, twenty-three and one-third per cent (23–1/3%); James R. Moore, fifteen per cent (15%); G. W. Shute fifteen per cent (15%).

The fourth paragraph of Article X to read as follows:

Any physical property belonging to the firm shall on dissolution be divided, twenty-three and one-third per cent (23–1/3%) to Thos. Armstrong, Jr., twenty-three and one-third per cent (23–1/3%) to Ernest W. Lewis, twenty-three and one-third per cent (23–1/3%) to R. Wm. Kramer, fifteen per cent (15%) to James R. Moore, and fifteen per cent (15%) to G. W. Shute; with the right to the survivors to purchase the interest of the retiring member at a reasonable value; and such member or his administrator or executor, will then withdraw his own library, including the additions thereto purchased with partnership funds pursuant to the provisions of Article III as amended.

Otherwise the original Articles of Copartnership dated as of January 1st, 1924, as modified on December 17, 1924, are continued in full force and effect.

Dated this 1st day of July, 1925.

THOS. ARMSTRONG, Jr.
ERNEST W. LEWIS.
R. WM. KRAMER.
JAMES R. MOORE.
G. W. SHUTE. [306]

(Lead pencil writing:) Armstrong & probably other members of firm have signed copies.

PARTNERSHIP AGREEMENT.

This Agreement made as of the 1st day of January, 1924, by and between Thos. Armstrong, Jr., E. W. Lewis, R. W. Kramer, James R. Moore and G. W. Shute, all of Phoenix, Arizona,

WITNESSETH:

WHEREAS, said Armstrong, Lewis and Kramer have been for many years, and are now, engaged in the practice of law as copartners, at Phoenix, Arizona, and intend to so continue, and the said James R. Moore and G. W. Shute are desirous of being associated with the said Armstrong, Lewis and Kramer as copartners in such business from and after this date, and such association has been agreed upon by all the parties hereto;

NOW, for the purpose of specifically defining the powers, obligations, rights and duties of each of said partners, and reducing to written form all of

the agreements of the parties in relation to the matter, it is now by all the parties hereto agreed as follows:

I.

From and after this date and for the term of five (5) years, or so much longer as the parties may agree, each and all the parties *ahll* be and continue to be copartners in the practice of law with their principal office in the City of Phoenix, Arizona, and each will devote his entire time, skill and service to the business of the partnership except that Thos. Armstrong, Jr., shall be obliged to give thereto only such time and [307] services as he may elect, but will not engage in the practice of law otherwise than as a member of the partnership during its continuance; and provided further, that no member of the firm voluntarily withdrawing therefrom will engage in the practice of law at any place in Maricopa County, Arizona, at any time prior to January 1st, 1929.

II.

The firm name of said partnership shall be Armstrong, Lewis & Kramer.

III.

Each partner shall furnish and keep up for the use of the partnership his own law library at the office of the firm. Each partner will purchase and add to his library from time to time such law books as the firm business may seem to require, and each will, as nearly as possible, make additions to his library equal in value to his proportionate part of

the distributive earnings of the firm. Equalization of library expenditures will be made between the partners at the expiration of each year on this basis.

IV.

The office furniture and fixtures in the present offices of the firm are the property of said Armstrong, said Lewis and said Kramer in equal shares and are of the value of Three Thousand Dollars ($3000.00). The incoming partners, said Moore and Shute, will each pay on or before —— 1924, to said Armstrong, Lewis and Kramer, one-eighth of such value, and thereafter all office furniture and fixtures and additions thereto will be the property of all the partners in the following named proportions:

Thos. Armstrong, Jr., E. W. Lewis and R. W. Kramer jointly, three-quarters (¾) thereof, James R. Moore one-eighth (⅛) thereof, and G. W. Shute one-eighth (⅛) thereof, and G. W. Shute one-eighth (⅛) thereof. [308]

V.

The expense of carrying on the business shall be paid out of the gross earnings.

VI.

The net earnings of the partnership shall be paid and divided as follows:

Thos. Armstrong, Jr.,	18%
E. W. Lewis	33%
R. W. Kramer	24%
James R. Moore	12½%
G. W. Shute	12½%

Division and payment of the net earnings shall be made monthly or whenever there shall be on hand One Thousand Dollars ($1000.00), or more, or net earnings not required for the payment of the current month's expenses; it will be the policy of the firm, however, to keep its cash balance in the bank up to at least One Thousand Dollars ($1,000.00) at all times, except that on December 31st of each year the entire net cash balance will be distributed as partnership earnings.

VII.

A bank account shall be kept in the firm name in the National Bank of Arizona in which there shall be deposited daily all cash, drafts and checks collected or received on firm account. All withdrawals from the bank shall be made by checks signed by the bookkeeper or cashier for the firm in the firm name, and countersigned by a member of the firm. All firm checks shall be consecutively numbered and stubs kept showing date, amount and to whom issued. A bookkeeper shall be employed who shall keep the books of account of the firm, and the books shall be so kept as to show earnings and expenses and an account of cash received and distributed, which account shall be balanced daily as shall also be all charges and credits of clients.

VIII.

The firm assets and credit shall not be used by any [309] partner for private purposes.

IX.

In case of any disagreement between the members of the firm as to firm policy, charges for services, acceptance or rejection of employment by clients, or other matters connected with the firm business, the same shall be referred for settlement to Thos. Armstrong, Jr., whose decision thereon shall be final and binding. In the absence of Mr. Armstrong such reference shall be made to E. W. Lewis.

X.

The new firm will assume and pay all the obligations of the old firm.

All earnings of the old firm of Armstrong, Lewis & Kramer collected or received after January 1st, 1924, shall be regarded as earnings of the new firm and treated and distributed accordingly. In view of this provision and of the fact that neither the said James R. Moore nor G. W. Shute have contributed to such earnings uncollected at said last-mentioned date, then on dissolution of this new firm by the expiration of this agreement or by the withdrawal, disability or death of either said Moore or said Shute, neither said Moore nor said Shute, nor his heirs, executors or administrators shall be entitled to participate in the distribution or division of any firm earnings thereafter collected for services theretofore or thereafter rendered.

As to the other members of the firm, to-wit, Armstrong, Lewis and Kramer, the partnership shall on the death or permanent disability of either thereof, be continued by the surviving partners and all

pending business conducted to a conclusion and all moneys due or to become due as shown by the books of the partnership, or as may thereafter become due by reason of the further conduct of such pending business, after paying all obligations of the firm to the date of such disability or dissolution [310] and a reasonable portion of the overhead expenses incident to the further conduct of such pending business, the net proceeds shall be paid and distributed to said firm members last named, or to their representatives, in the same proportion as though no disability or dissolution had occurred.

Any physical property belonging to the firm shall on dissolution be divided one-fourth (¼) to Thos. Armstrong, Jr., one-fourth (¼) to E. W. Lewis, one-fourth (¼) to R. W. Kramer, one-eighth (⅛) to James R. Moore, one-eighth (⅛) to G. W. Shute, with the right to the survivors to purchase the interest of the retiring member at a reasonable value, and each member or his administrator or executor, may then withdraw his own library.

This agreement shall be binding upon the parties hereto, their heirs, executors and administrators.

IN WITNESS WHEREOF the parties hereto have set their hands this 27th day of December, 1923.

THOS. ARMSTRONG, Jr.
ERNEST W. LEWIS.
R. WM. KRAMER.
JAMES R. MOORE.
G. W. SHUTE.

(Following in lead pencil handwriting:) Armstrong and probably other members of firm have signed copies. GWS. (?) [311]

Thereupon Creditor's Exhibit No. 23 was admitted in evidence without objection, as follows: [312]

CREDITOR'S EXHIBIT No. 23.

MODIFICATION OF PARTNERSHIP AGREEMENT.

The partnership agreement of Armstrong, Lewis & Kramer dated as of January 1, 1924, is hereby modified and amended as follows, to take effect on January 1, 1925:

Add to Article I:

It is expressly understood that R. Wm. Kramer is not expected to do, and is exempt from doing, any work for or on behalf of the firm outside usual office hours.

It will be the policy of the firm to close its offices at One P. M. on Saturday.

Article VI is hereby amended to read as follows:

The net earnings of the partnership shall be paid and divided as follows:

Thos. Armstrong, Jr., ten per cent.

Ernest W. Lewis, forty per cent.

R. Wm. Kramer, twenty per cent.

James R. Moore, fifteen per cent.

G. W. Shute, fifteen per cent.

It being understood that in case said Thos. Armstrong, Jr., shall relinquish his present employment

as president of The National Bank of Arizona the percentage of earnings for distribution to each of the partners will be restored as in the articles of Januray 1, 1924.

There is added to Article X the following:

Robert H. Armstrong is admitted to partnership in the [313] firm but for the present on a salary basis of Two Hundred Twenty-five Dollars ($225.00) per month. In case of his death, withdrawal or permanent disability neither he nor his executors or administrators shall be entitled to any share or interest in the firm or its property or its earnings collected after the time of such death, disability or withdrawal. He shall not be required to contribute to, or keep up, the library for the use of the firm.

Otherwise the original articles of copartnership dated as of January 1st, 1924, will be continued in full force and effect.

Dated this 17th day of December, 1924.

THOS. ARMSTRONG, Jr.
ERNEST W. LEWIS.
R. WM. KRAMER.
JAMES R. MOORE.
G. W. SHUTE.
ROBERT H. ARMSTRONG.

(Following in lead pencil handwriting:) On Jany. 1, 1926, Kramer and made a (word not readable) agreement whereby I took 36% and Kramer 24% otherwise no change. GWS.(?) [314]

Thereupon Creditor's Exhibit No. 24 was admitted in evidence as follows: [315]

CREDITOR'S EXHIBIT No. 24.

Dividend of A. L. & K. to Geo. W. Shute.

1923	$400 per mo. except Dec. when	$600.00	$5,000.00
1924	January 15	450.00	
	February 1	375.00	
	March 7	437.50	
	April 2	250.00	
	April 16	375.00	
	April 23	250.00	
	May 10	375.00	
	May 21	750.00	
	June 17	220.00	
	July 9	225.00	
	July 24	150.00	
	August 18	525.00	
	September 16	300.00	
	October 3	187.50	
	October 21	300.00	
	November 5	225.00	
	November 10	150.00	
	December 12	287.50	
	December 23	150.00	
	December 31	352.45	6,339.95
	[316]		
1925	January 12	450.00	
	February 2	300.00	
	February 11	750.00	
	March 5	300.00	
	March 19	225.00	

1925	April 13	375.00	
	April 20	225.00	
	April 24	450.00	
	May 11	270.00	
	May 25	450.00	
	June 30	600.00	
	July 13	150.00	
	July 30	150.00	
	September 9	450.00	
	October 8	300.00	
	October 26	150.00	
	November 4	375.00	
	December 12	450.00	
	December 31	319.14	6,739.14
1926	January 16	180.00	
	February 6	750.00	
	February 24	225.00	
	March 9	225.00	
	March 26	900.00	
	April 23	450.00	
	April 27	300.00	
	May 24	300.00	
	May 29	300.00	
	June 17	450.00	
	July 13	375.00	
	August 16	225.00	
	[317]		
	August 27	300.00	
	September 21	675.00	
	October 11	750.00	
	November 15	300.00	
	November 22	(Torn off)	

1926	December 14	225.00	
	December 23	370.00	
	December 31	222.45	7,827.45
1927	January 3	825.00	
	January 21	750.00	
	February 16	450.00	
	March 8	450.00	
	April 11	675.00	
	April 27	450.00	
	June 6	6,000.00	
	June 9	300.00	
	July 6	875.00	
	July 21	675.00	
	October 3	500.00	
	October 25	500.00	
	November 8	375.00	
	November 15	400.00	
	November 25	825.00	
	December 19	750.00	
	December 31	450.20	15,250.20
1928	January 26	300.00	
	February 16	750.00	
	March 14	625.00	
	April 10	775.00	2,450.00
			$43,606.74

[318]

Mr. NEALON.—Now, may it be stipulated that no books of account were kept by Judge Shute

showing resources—I mean receipts and disbursements and his business transactions?

Mr. MOORE.—No, we won't admit that, Judge Nealon.

Mr. NEALON.—Well, I think it is proven by the record anyway.

The COURT.—What you mean by that is that he did not keep a regular set of books?

Mr. NEALON.—That is what I mean. Nothing that will show his complete income or his complete business transactions. In other words, this is the point, if your Honor please; there are several sources of large income that are not shown anywhere in the records furnished to us at all, nor do the stubs and check books—the stubs and the checks show the purpose for which checks were drawn. As an illustration, the $5,000.00 just testified to shows nowhere in any record.

The COURT.—What $5,000.00 do you refer to?

Mr. NEALON.—The $5,000.00 paid by Julian or the $10,000.00, rather, and the disbursement of the $5,000.00 back to Bandauer. Neither does the payment of the $8,000.00. show anywhere. There are other items of the same kind and the testimony of Judge Shute is—on file is that he cannot account for that for a good many items.

Mr. MOORE.—Cannot account for what, Judge Nealon?

Mr. NEALON.—For the different items which he is questioned about in regard to his receipts and disbursements.

Mr. LEWIS.—Mr. Nealon, I believe that you recall at the last meeting of creditors that he submitted a fairly comprehensive statement covering all receipts and disbursements which—just a moment, please—which was made up from the checks, stubs, the Armstrong, Lewis & Kramer sheets, information from the bank and the bank statements. Now, that was made up in a very reasonable time after those sheets were obtained from you. I will admit that [319] it was not handed to you prior to the date of filing specifications. However, it was made from information which was in your possession at that time.

Mr. NEALON.—Well, sources of information are shown in Judge Shute's testimony in regard to that but that is not yet in evidence.

Mr. LEWIS.—No, but at the same time—

Mr. NEALON.—My contention on that is, if your Honor please, when it comes up, that that is not a statement of or explanation of the disposition of the assets. In other words, it is more a statement of the nature of the bank account and from such outside sources of information as Mr. Lewis was able to obtain and which Judge Shute was able to obtain, all of which appears in the transcript of December 27, wasn't it?

Mr. LEWIS.—Yes, and exhibits.

Mr. NEALON.—Now, I have here everything that has been furnished me in regard to the keeping of any records of any kind, merely bank statements, stubs, original checks and bank account. Many stubs and checks are missing in this. The

matter is not complete and I don't think that it can be considered as even an attempt to comply with the requirement of the statute as to the keeping of books or to the accounting either but I am willing to have this introduced in evidence for what it is worth, as one exhibit.

Mr. MOORE.—What is the purpose of it, may I ask, Judge Nealon?

The COURT.—The charge is he is not entitled to a discharge because he did not keep books as required by the statute. That is a matter to be considered by the court, when it comes.

Mr. MOORE.—Of course, that applies to a business man who did not keep books, for the purpose of concealing his assets. I don't know of any lawyer who keeps any books of what he does with money after he gets it. I know I never have.

The COURT.—No. There may be lawyers who do that. I don't [320] know.

Mr. NEALON.—Then, I offer it as the only records furnished me in this case.

Mr. MOORE.—We object to that, the *only furnished* you. It does not show that he did not keep books. As I understand it, you are furnishing what you have there to show that he did not keep any books?

Mr. NEALON.—That is the exact purpose of it. Now, we offer all that has been furnished. I think you will concede that, Mr. Lewis. You have checked these books.

Mr. LEWIS.—If there is any mistake in them,

we will check them over. As far as all of the checks being there and all that, I believe that is correct. In fact, there is more there—

Mr. NEALON.— —than you did furnish.

Mr. LEWIS.—That really should be, due to the fact that some Armstrong, Lewis & Kramer checks are there.

The COURT.—I think that is true. All that you wish to show now is that this bankrupt did not keep a set of books, as required by the statute?

Mr. NEALON.—Yes, sir.

The COURT.—And did not keep a set of books so complete and perfect as to show all of his assets and his liabilities?

Mr. NEALON.—Yes, sir.

The COURT.—His income and what he expended?

Mr. NEALON.—And his business transactions of 1926 that the amendment speaks of.

The COURT.—There is no pretension that he did keep such a set of books?

Mr. MOORE.—Oh, no.

The COURT.—You do not have to introduce all of that stuff.

Mr. MOORE.—We won't say that he did not keep it in accordance with the statute. [321]

The COURT.—I don't believe that you will admit that. I am saying that his position is that the bankrupt did not keep the set of books—a set of books which will show his income and his expenses, his assets and his liabilities.

Mr. MOORE.—Show the source of his income and the purpose of each expenditure. Those books were not kept.

It was thereupon stipulated by counsel that Mr. England's testimony heretofore given before the referee would be considered as admitted, it being apparent that he was too ill to attend the trial.

It was thereupon stipulated by counsel that copies of the Creed and Noble notes might be substituted for the originals and introduced in evidence, the same being numbered Creditor's Exhibits Nos. 25 and 26, and being as follows: [322]

CREDITOR'S EXHIBIT No. 25.

Collat.

Phoenix, Arizona, October 18, 1927.

For value received I promise to pay to the order of

The National Bank of Arizona at Phoenix

At its banking house at Phoenix, Arizona, the sum of: Twelve Hundred .....Dollars, in installments as follows:

Fifty ($50.00) Dollars or more December 1, 1927.

Fifty ($50.00) Dollars or more on the first day of each and every month thereafter until the entire sum of $1200.00 shall have been paid.

All with interest from *dae* until paid, at the rate of 8 per cent, per annum, interest payable quarterly,

Failure to pay any installment or to make any

interest payment as and when the same is herein promised to be paid, shall render all installments hereof immediately due and payable at the option of the holder thereof. Should this note be placed in the hands of an attorney for collection, I promise to pay ten (10) per cent additional hereon as attorney's fees. The makers and endorsers hereby waive demand, protest and notice of non-payment.

Principal and interest payable in gold coin of the United States of America.

Address: ~~305 Heard Bldg.~~ JOSEPH E. NOBLE.
Address: 762 East Culver, See C. T. W.
No. 15693. Due 11–1–29. JAN. 4—1928 L 2. 9.

(Back)

G. W. Shute.

Paid by G. W. Shute. Feb. 27, 1928. (Circular rubber stamp—paid Feb. 27, 1928.) [323]

CREDITOR'S EXHIBIT No. 26.

No. ———.

Phoenix, Arizona, April 14, 1928.

On or before three years after date, for value received we promise to pay to the order of JESSIE M. SHUTE the sum of ONE THOUSAND FIVE HUNDRED ($1500.00) Dollars, with interest at the rate of six per cent per annum from date until paid. Interest payable every three months, and if not so paid to be added to the principal and become a part thereof and to bear interest at the same rate. ~~And should the interest not be paid when due then~~

(Testimony of Wesley Goswick.)

~~the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.~~ Principal and interest payable in Gold Coin of the United States of America at ———.

LESLIE H. CREED.
VIRGINIA S. CREED.

$1500.00 due April 14, 1931.

(Back.)

Interest to July 14. $22.50.
Interest to Nov. 14. $22.00.

The trustee and objecting creditor then rested, whereupon testimony was given for the bankrupt as follows: [324]

TESTIMONY OF WESLEY GOSWICK, FOR THE BANKRUPT.

(Witness for the Bankrupt.)

(Examination by Mr. MOORE.)

My name is Wesley Goswick. I live at Payson part of the time. I have lived up in the Tonto Country thirty or thirty-five or seven years. I know Walter Shute. I have known him ever since I have been in the country. I knew him when he was a boy. I have spent practically all of my time in Arizona up in the Tonto Country around Globe. Some time, say in 1924, I located some cinnabar claims up in the Tonto. They were located in my name. Nobody had an interest in those claims besides me. Mr. Packard had an interest in the proceeds that I might have received from the sale

(Testimony of Wesley Goswick.)

of those claims. I told him that I would whack up with him but he was not on the papers at all. Mr. Packard is my son-in-law. Judge Shute did not have an interest in those claims. I recall an option that I gave on those claims along in 1925 or 24 to Bedford and Stalker. Mr. Shute negotiated that sale to Bedford and Stalker for me. I had an agreement with Shute that he was to receive a commission for negotiating that sale. I told him I would give him 10%. I have not the option agreement. The price for which I sold the claims was a hundred thousand dollars. Under the terms of the option, they were to do certain work and install certain machinery on the property. They went into possession of the property under the terms of the option. The first payment that they made was $5,000.00. They must have spent $75,000.00, at least, on the property. It was expended for roads and development of the mine and building the camp. Lots of things. And installation of machinery. Under the terms of that option, in the event they forfeited it, they would have to leave their improvements and their machinery on the premises. They forfeited the option. Everything they had stayed right there. That was along in the fall in October, 1926, I believe. When they forfeited the option, they left a compressor and they left a lot of piping and they left a lot of drills and they left seventeen houses and 62,000 feet of lumber and four or five hundred dollars worth of chuck and a lot of other stuff on the property. It had cost them $35,000.00 to

(Testimony of Wesley Goswick.)

[325] put a road to the property. They never made but the one payment of $5,000.00. I paid Judge Shute 10% of that $5,000.00. I paid Bill Packard $2500.00. I guess he paid Judge Shute $2500.00 from the $2,000.00. I don't know about that. I paid Judge Shute $250.00 from that first payment. After Bedford and his associates had forfeited their option, they were moving machinery off and, as soon as I heard about it, I went down to stop them and took charge of it myself.

The next thing that was done with reference to a sale was that I turned it to Mr. Foster—L. E. Foster of Silver City. I made a trade with him. The terms of that option—the purchase price was $200,000. I believe it was dated the 8th day of December, 1926, but I just don't remember the date. The first payment under that was $5,000.00. What took place when I was at Globe about the 8th day of December relative to signing the papers on the Foster option was this: Me and Mr. Foster went to town with the papers, and I was up in the Clerk's office in the courthouse, and Walter walked in and I *sez,* "Here is the man I want to see now," and he come over there and I showed him the option and he looked at it, and we went on up to the Globe Hotel where Foster was in a room, and talked with him about it. We went right ahead, and that was about all that was done. The judge looked at it—looked at the papers. Prior to the 8th of December, if that is the date I have been speaking about, I

(Testimony of Wesley Goswick.)

had not talked to Judge Shute about the deal with Foster. He never knowed there was a deal up. I did not give Judge Shute any portion of [326] the $5,000 that was paid by Foster at the time the papers were executed. The next payment was $10,000, due in six months, and that was made. I did not give Judge Shute any portion of that $10,000 payment. I give him some money along, but I never give it to him on no 10% or nothing of that kind. I give him some money about the time that payment was made. I don't recall just what date. I think I sent him a check. The next payment was made on the 8th of June, 1928, and was $20,000. No, that is a mistake, as you say. The next payment of $20,000 was the 8th of December, 1927. That is right. On or about the time that payment was made I gave Judge Shute $2,000. The next payment was approximately $80,000, on the 8th of June, 1928, and I give Judge Shute some money along about that time. I give him $8,000. I delivered that money to him in town—the town of Globe. I give him the cash. The reason I happened to have that cash, $8,000, in my possession, I brought it out to buy the Bar X Cow Ranch at Pleasant Valley and we just got back. I just got there when I met the judge going over across the street. I don't know how long before that I had drawn the money from the bank. It might be something like a week or ten days. I had taken that money up to buy a cow ranch, the first payment on it, and the deal did not go through. When

(Testimony of Wesley Goswick.)

I got there the boy had done sold it—McFadden boy, and I returned to Globe the day I met Judge Shute. To explain why I gave Judge Shute these sums of money—$1,000—$2,000 and the $8,000—I thought he needed it and he was a friend of mine. Judge Shute and I have been in mining deals together. He has grubstaked me. You might call it grubstaking or something. He got up all of the money and I worked and he hired a man and put with me. That grubstaking continued while I was working on that property on the Reservation. That is not the cinnabar property. That has been six or seven years ago that we worked on the Reservation. It was before Judge Shute came to Phoenix. The [327] judge was living in Globe then and was still on the bench. Judge Shute and I have always been friends so far as I know. At least I have with him, and he acted like he was a friend of me. If I wanted any money I could get it if he had it. He was always willing to help me out in any way he could. I never asked him for a favor that I didn't get it. He has not come to my rescue in time of trouble, for I have never been in trouble. He sure has assisted me in years past when I have been in financial distress, you bet. I never did promise Judge Shute that I would give him a nickel out of the proceeds of this sale to Foster and his associates of this cinnabar property, and he never did ask me. A short time after the Foster deal, some trouble arose between Mr. Packard and me over the title to this property. Mr. Packard is my

(Testimony of Wesley Goswick.)

son-in-law. He demanded a half interest in the claims and wanted me to execute a deed to him for the half interest. I don't think Mr. Packard was entitled to a deed for a half interest in the property. Our entire misunderstanding was as to whether or not I would execute a deed to a half interest in the property. That dispute might have become very serious. It might have got to be pretty rough. I think Judge Shute was a friend of the Packard family, as well as of me and my family, and had been for a number of years. He done all he could toward settling that dispute between Packard and me. He finally settled it. That settlement was made along in August if I remember right, year before last, in August, 1927. That was made between the making of the $10,000 payment which had been made in June, and the $20,000 payment which was to become due in December, 1927. Packard and I were at Payson when Judge Shute arranged this settlement. Judge Shute was up there at the time. I was up there camped in a little clump of trees about five or six hundred yards from Packard. I recall Judge Shute coming up to see me and telling me he had arranged an adjustment of that controversy with Packard along certain lines if it was agreeable [328] to me, and I told Judge Shute to go right ahead. The arrangement reached was the one that has been testified to here this morning, by which Packard was to receive one-half of 70% of the $200,000. He was to receive it in cash. That was

(Testimony of Wesley Goswick.)

65% instead of 70%. After deducting 70% from the $200,000 Packard got half of what was left. The reason I give Judge Shute $2,000 in December, 1927, was because he told me he would need some money before long. I was talking to him a while before that. I sent that money to him by check. I sent it to him from Mesa. I didn't enclose a letter with the check—just sent the check. [329]

Cross-examination by Mr. NEALON.

Yes, I say I gave these sums of money to Judge Shute. These sums were a gift. They were not a payment on an agreement. There was no agreement on the last deal at all. On the first option with the Dougherty people there was an agreement between me and Judge Shute that he should have 10% of each of these payments as they came in. There wasn't an agreement to that effect on the second one. I didn't promise to pay each of these payments of 10% of the amount I received as they came in. I gave him some money. I never paid him no 10% or nothing like that. I don't know whether the amount I paid him amounted to 10% of each payment as it came in. I never figured it up. The first payment that was made to him under that new contract by me and by Mr. Packard jointly was $500. I don't remember whether the second payment was made by me and Mr. Packard jointly of $1,000. I don't remember when I gave it to him. I did not keep track of it. I would not say whether it was at the time the $10,000 payment was made in

(Testimony of Wesley Goswick.)

June of 1927 that I paid him $1,000 [330] or further up or back. I don't remember. I don't know whether I gave him $1,000 or more or less. I might have give him $1,000 or more or less. I don't remember. I don't keep the checks. I would get a report at the bank at the end of the month and I would take the old checks and burn them up. I guess the next payment due on that contract was $20,000. It was due on December 8, 1927. I paid him in the month of December $2,000. I would not call it payment. I sent it to him. I sent him my check for $2,000. When the next payment of $80,000 or approximately that was made, Judge Shute was in Globe. I met him there and at that time I paid him approximately 10% of the amount paid. I give him $8,000. There was some small payments provided in that contract of $150 a month and some returns from royalties to be made into the bank. I didn't give any part of that to Judge Shute. There was not a verbal agreement between me and Judge Shute under which I was to pay him 10% of the moneys received from the sale of this property to Foster as they came in. I never stated heretofore that there was such a verbal agreement. Not of the last deal. The first deal there was. I never said no such thing. I never stated heretofore that I had made a verbal agreement to pay Judge Shute 10% of the payments under the Foster agreement as they came in. I am sure of it. I know Mr. McBride, the gentleman who is sitting there. I met him up the road one

(Testimony of Wesley Goswick.)

time. I guess it was in November of last year. I guess Mr. McBride was accompanied by Mr. Cline at that time.

Q. Now, at that time, didn't Mr. McBride ask you if there had been an agreement between you and Judge Shute and didn't you say that there had been a verbal agreement between you?

A. I said on the old deal—on the first deal there was.

Q. I am not asking about the first deal at all. I am asking about the second deal.

A. I never said it. [331]

Q. Didn't you say that you had paid him in pursuance to that agreement 10% of the money as it came in? A. Of the last deal?

Q. The last deal. Answer the question so the reporter can get it, please.

A. Well, ask me again what you said.

The REPORTER.—(Reading:) "Q. Didn't you say that you had paid him in pursuance to that agreement 10% of the money as it came in?"

A. That is, on the last deal?

Mr. NEALON.—Q. Yes, on the last deal.

A. No.

Q. You did not say that to him?

A. No, I told him on the old deal.

Q. I am talking about the—

A. Well, I am too. I said I did not tell him that on the last deal.

Q. Didn't you tell him that you and Mr. Packard

(Testimony of Wesley Goswick.)

had paid $500.00 out of the first payment that was made upon that property by Foster?

A. On the first?

Q. No, on the contract with Foster—first payment on the contract with Foster.

A. No, I don't think I told him that.

Q. Well, you don't think so now. You know whether you did or not. A. No, sir.

Q. Will you say that you did not tell him that?

A. No, sir, I won't.

Q. Will you say that you did not tell him that there was a verbal agreement there made by you?

A. I never told him there was a verbal agreement on the last deal. I told him there was one on the first deal. [332]

I didn't tell him there was a verbal agreement on the last deal, the Foster deal. He might have got it that way, but I never told him that. I told him there was an agreement on the first deal—on the old deal. I didn't tell him that I had paid $500 under that agreement to Judge Shute when the first payment was made. I don't remember about telling Mr. McBride on that same occasion that I had paid him $1000 under that verbal agreement when the $10,000 was paid. I don't remember whether I told Mr. McBride that or not. I don't remember whether I paid Judge Shute the $1000. I don't think so. There was no verbal agreement.

Q. Now, didn't you tell Mr. McBride that you paid the $2000.00 in December, 1927, as a payment

(Testimony of Wesley Goswick.)

of his 10% on the $20,000.00 payment made in December, 1927?

A. I might have told him that I sent Judge Shute $2000.00, yes.

Q. Didn't you tell him you made that payment under the verbal contract with Judge Shute?

A. On the last deal?

Q. For the payment under the Foster contract?

A. No.

Q. You did not? A. No.

Q. Please say it so that the reporter can get it.

A. No, I did not.

Q. You did not say it. All right. Didn't you say to him that you had paid Judge Shute, in June of 1928, $8000.00 as a payment due him under the Foster contract when the $80,000.00—approximately $80,000.00 was paid to you, Mr. Goswick?

A. I told him that I gave Judge $8,000.00, yes.

Q. Didn't you tell him that it was a payment under that contract? A. I don't think I did.

Q. Are you sure that you did not? [333]

A. No, I ain't sure.

Q. You are not sure that you did not tell him that it was paid under that contract? A. No.

Mr. MOORE.—Now, what contract are you talking about?

Mr. NEALON.—We are only talking about one contract and that is the last contract or the Foster contract. That is the only one under which $80,000.00 has been paid. There can be no mistake about it.

(Testimony of Wesley Goswick.)

Mr. NEALON.—Q. Mr. Goswick, I will repeat the question. Didn't you tell Mr. McBride at that meeting in November that you had paid to Judge Shute $2000.00?

The COURT.—He has answered all of that about the $2000.00 and the $1000.00. Now, come back to the $8000.00 You have gotten to that point.

Q. Mr. Goswick, didn't you tell Mr. McBride at that meeting between you in November, that in June, 1928, you paid Judge Shute $8000.00, under your verbal agreement with Judge Shute, when the $80,000.00 was paid to you under the Foster contract.

A. I told him that I give Judge $8000.00.

Q. Didn't you tell him that you paid it under the contract? A. No, I did not.

The COURT.—Now, that is enough along there. Go on to something else.

Mr. NEALON.—Q. Didn't you tell him, at that same time, that you recognized that you would owe him, when the final payment was made, 10% of the amount and that your word was as good as your bond and you would pay Judge Shute when the final payment was made on the property?

A. I don't remember anything about that at all. I don't remember whether he asked me that or not.

Q. Do you remember saying to him that your word was as good as your bond? A. No, I do not.

Q. You don't remember whether you said anything about that at all or not?

A. About what? [334]

(Testimony of Wesley Goswick.)

Q. About paying the $8000.00 to Judge Shute under the verbal contract?

A. I remember telling him I give Judge $8000.00 but I don't remember anything about the other.

Q. And then about the—

A. There were no contract.

Q. Then, the other payment that was to be made later, under the payment due December 8, 1928, that when that payment was made you intended to pay Judge Shute 10% of the amount?

A. I don't remember anything about that at all.

I do not remember saying to Mr. McBride that total sums making $20,000 were to be paid under that verbal agreement with Judge Shute. I don't think I did. I have no recollection of it. I made the sale to Foster myself. In regard to this settlement with Packard, Judge Shute had said something about Jess Henderson claiming $50,000 from the sale of the property but I don't remember what it was. I don't remember anything about that. Mr. Packard said it was due Jess Henderson. I don't remember whether Judge Shute told me that Packard said to him that he, Judge Shute, was entitled to $20,000. I don't know whether those two items of $20,000 and $50,000 were deducted from the $200,000.00 in order to make that settlement. Shute made the settlement with Packard himself. Yes, I think $70,000 was deducted and the agreement was that the balance was to be divided between me and Packard. I don't remember whether Judge Shute told me that $20,000 of that amount was the

(Testimony of Wesley Goswick.)

sum that Packard said was due him under that contract. I did make a settlement with Packard that he was to get $65,000 out of the payments to be paid in on the Foster contract to the Old Dominion Bank. I guess that agreement is a part of the escrow. It ought to be. I guess Judge Shute worked that agreement out. That was given to Packard because that was just about what was coming to him according to the work he has [335] done. I figured that was coming to him because he helped me work a little up there and then he was in the family. If $20,000 was deducted in the settlement with Packard and another $50,000 I don't know nothing about it. Judge Shute made that contract, of course. He made it without any consultation with me. I told him to go ahead and see if he could settle it up. Most any way that he settled it was all right with me. Yes, he explained to me how he settled it. He showed me the papers and I signed them. He explained to me how those figures were arrived at. He said he would deduct so much and then I would give Packard half of the other. I don't remember whether he said that $20,000 of that deduction was what Packard said was due him. He never told me that. Not that I remember at all. He didn't tell me about the deduction of $50,000 because Jess Henderson claimed that amount was due him. He just told me that he could settle it on a certain way and deduct 35% out and Packard to get half of what was left. I don't know when I paid this money to Judge Shute,

(Testimony of Wesley Goswick.)

whether I paid it on the basis of that $20,000 that was deducted. I give him some money. He can have all the money I have got any time he wants. As to expecting to pay him $8000 more when the balance of the purchase money under the Foster contract is paid, I don't expect to pay him anything unless I want to. I did not say to Mr. McBride at that meeting, as each of these $7500 payments would be made, under the extension of that last payment on the contract, that I would pay Judge Shute $750 of it. I don't remember telling him any such thing at all. I won't say that I did not tell it to him. I don't remember. I have not paid him $750 of the payments that have been made since then. I haven't paid him any money since then. As to expecting Judge Shute to repay me any of these sums of money I have testified to paying him, he will if he ever makes it, yes. I expect him to repay part of it if he wants to. When I testified a while ago that it was a gift I meant [336] he can give me some, can't he? He can give me some if he wants to. If he doesn't, why it is jake with me.

TESTIMONY OF LOUIS E. FOSTER, FOR THE BANKRUPT.

(Being Called as a Witness for the Bankrupt.)

(Examination by Mr. MOORE.)

My name is Louis E. Foster. My home is in Silver City, New Mexico. I know Wesley Goswick, the man who has just testified. In the fall

(Testimony of Louis E. Foster.)

of 1926 I negotiated an option on a cinnabar property owned by him up in the Tonto Basin. I first knew Judge Shute when the papers were ready to sign. I think it was December 8, 1926. It was right there at the time we signed the papers. I conducted the negotiations for that contract entirely with Wesley [337] Goswick. Judge Shute's name was never mentioned during my negotiations for that contract. I never received any communication from Judge Shute by correspondence or otherwise nor from anybody on his behalf prior to December 8, 1928. The way the deal come up first, we were operating the Arizona Cinnabar Company property and I understood, through Mr. Baker of that company, that the liability of the Arizona Quicksilver Company not completing their contract and I made a trip up at that time to see Mr. Goswick and I told him if it ever became open I wanted to handle it and wished he would let me know at once, because we would like to get it and the only one that I have ever heard from was Henderson and Duncan at Globe but they had nothing to do with it, that is, merely told me that the thing was open was all. The deal was completed with Mr. Goswick direct.

Cross-examination by Mr. NEALON.

I know Jess Henderson. It was not through him that I learned first that the property was for sale again. It was what you might call common knowledge around there that they were not going ahead

(Testimony of Louis E. Foster.)

with it, and, in fact, before I left for home, I had been told by Mr. Baker and one or two others that they thought the thing was not going through and I left word with one or two of them to let me know and Mr. Goswick, of course, he is out there at the mine and it is very difficult to get any such communication through and I told one or two of them to notify me if it became open and then I would come on over. I had no communication with Jess Henderson about it except one telegram. Well, that was not from him direct. Mr. W. G. Duncan sent me a wire and said that Henderson had word that the property was open and that—I know nothing at all about any arrangement between Mr. Goswick and any other person in regard to sales or compensation for sales or [338] compensation for services. When this contract was drawn between Mr. Goswick and me, we had the original contract drawn by my New Mexico attorneys. This is my remembrance but I would not swear to it but I think those were mailed to Mr. Goswick. That is as I remember it, and later I saw him and we discussed a few points in the matter, that is, there was one or two little things in there that I wanted kept and he wanted out and the final papers—there was one or two little changes in them. There was very few. He did not make any definite statement to the effect that he would have to consult with his lawyer in regard to it. I assumed, though, of course, that naturally he would have some lawyer glance it over some time before he signed it. I

(Testimony of Louis E. Foster.)

could not say how [339] long he kept those papers before he and I executed them at the Old Dominion Bank. It was not but a very short time. It might be a week or so. Something like that. I don't recall definitely. I don't know whether Judge Shute had been employed by Mr. Goswick or not. Nor do I know of any services that he had rendered. That was nothing I had anything to do with. I came across Judge Shute somewhere and went up to the hotel when the papers were ready to sign. I don't just recall whether Judge Shute was there or not at the final consummation of the deal, as a representative of Mr. Goswick or advising him, and I will tell you why. At that time, we provided a number of contracts and, to tell you the truth, I couldn't tell you whether Judge Shute was there or not when the papers were actually signed. But he was there just practically the day that we signed them but whether he was present to see the signatures or not, I don't recall. He did not go over all of the papers in my presence. Mr. Goswick had the papers when I saw him.

TESTIMONY OF ALICE PARRY, FOR THE BANKRUPT.

(Being Called as a Witness for the Bankrupt.)

(Examination by Mr. MOORE.)

My name is Alice Parry. I live in Phoenix. I am bookkeeper and chief clerk in the organization of Armstrong, Lewis & Kramer, of which Judge Shute is a member. I have occupied that position

(Testimony of Alice Parry.)

about eight years, and, ever since Judge Shute has been a member of the firm. It is a part of my duty as bookkeeper and chief clerk to prepare the income tax returns for the members of the firm. I do that by first figuring up the distribution of the earnings of each individual member of the firm and, then, when I find one of the members at leisure and I have time, I ask them if they have any other income and, finding that they have or they have not, I go ahead making up the individual income tax returns, asking them at various times if they have had any contributions, [340] any taxes or anything else that is deductible. I generally figure depreciation myself. All I ask them for is their income and their taxes that they have paid out and their contributions and interest and the various other items that are taken into consideration, and, then, when I have all of that data assembled, which sometimes I get from them and sometimes I get from their files, why, I figure—I take their income tax return and I figure that out. First, I figure it up as if all of the income was theirs and then I divide it equally between the husband and the wife, to see which way they will have to pay the least amount, and the way that is least, why, then, I put on the return and then I hand it in to them and ask them to sign it and give me their check and I mail it out for them. I haven't known it if any member of the firm has made a practice of checking over those returns after I have prepared them. They always sign it as I hand it to them.

Q. Referring to the return that you made for Judge Shute specifically, do you recall making a

(Testimony of Alice Parry.)

deduction on account of depreciation of the house at Globe?

A. I am sure that I did. I haven't the return before me but I imagine I made the return and deducted the 3% for depreciation, because that is the fixed amount.

Mr. MOORE.—Q. Mrs. Parry, I refer you to copy of Judge Shute's income tax for the year 1927, which is attached as an exhibit to Judge Shute's testimony given before the referee on June 15. Will you examine that and see if you can find a deduction for—I don't know where such appear on those things—the Noble note?

A. Yes, it is on the return of Judge Shute charged to bad debts. On the return of Judge Shute, charged to bad debts, Joseph Noble, $1200.00.

Mr. MOORE. — Q. Now, Mrs. Parry, state whether or not Judge Shute directed you as to whether that should be charged off on his return or Mrs. Shute's return? [341]

A. Well, he didn't tell me to take it off of either.

Q. And did you take it off of the one that you thought would save the most taxes?

A. I did. I juggled the figures around until I found out which one would be the—would fix it so that there would be the less taxes.

Q. You followed that practice as to all members of the firm in making a joint return for husband and wife. A. I did.

Cross-examination by Mr. NEALON.

I got the information as to the income from the Globe property that I listed in the taxes for 1927

(Testimony of Alice Parry.)

direct from Judge Shute. I don't know whether I asked Judge Shute for that or whether some time when I saw him I said, "Judge Shute, how much rent do you get for the Globe house," and he probably told me. I would get it direct in that way. I have no other means of obtaining it. I had no other means of obtaining the amount of the taxes he paid on that property other than to obtain it from him or from the files. I mean from his personal files. They would just show the tax receipts, I imagine. I think I got it from him, though. The tax receipts might be filed away. I don't remember whether or not they were delinquent that year. I got the information on which I deducted from Judge Shute's personal account—personal return for 1927—the amount of the Joseph E. Noble note and interest, from Judge Shute. I did not have the note before me when I prepared that return. I did not have the record of the payment to the bank by means of check or otherwise on that. I took that item just as given me by Judge Shute. I did not know when I prepared that return that the Joseph E. Noble note had not been paid prior to December 31, 1927. I based the preparation of that return on the information given me by Judge Shute. I am familiar with the method of making these returns. I have been [342] making them up for 10 or 12 years. In regard to the item on the return of 1927 where there is reported an item "Wesley Goswick, commission on sale, $1000," when I was getting this information from Judge Shute of the various sources of his income, he probably told me Wesley Goswick gave him $1000. I probably put

(Testimony of Alice Parry.)

"commission on sale" on there myself because I did not know what else to put on. I have not an independent recollection of it at this time. Whatever information I did have I obtained from Judge Shute. I didn't know anything other than Judge Shute told me about the Wesley Goswick transaction. I don't know how I arrived at the conclusion that a commission on sale was the proper way to explain that return. I think I went to Judge Shute and asked him—"Now," I said, "here is the amount that Armstrong, Lewis & Kramer paid you. Did you get any other money," and, whatever is listed there, he told me, and Wesley Goswick $1,000.00. Well, I did not ask him any further. He said Wesley Goswick paid him $1,000.00 and, then, when I came to make up that statement, I suppose I thought, "Now, what was that for? I ought to explain that," and I knew that Wesley Goswick some time had sold his mine but I really didn't know that he paid Judge Shute that for commission. I have put that in there of my own volition. Why, I don't know. Because I thought there was an explanation necessary. The reason I didn't ask Judge Shute for that explanation, sometimes the men in our office are awfully hard to get at. They are busy, and, when I have a few minutes time, why, they are busy. When they have a few minutes time, why, I don't think of these questions or I am so busy I have no time to ask them. When I make up these returns, as a rule, they are in conference or they are in court and a lot of this I have fixed up and I think, "Well, if there is any corrections, they will be caught and come back to me," but, as a rule,

(Testimony of Alice Parry.)

these income tax returns lay on their desk until the 15th of March and I have to go in and say, "Judge Shute, will you please [343] sign your income tax return," and he will say, "Mrs. Parry, where is it," and I will say, "I put it on your desk," and so we hunt around and find it and he signs it and gives me a check and I send it off. My practice is when I have completed the preparation of the return to place it on Judge Shute's desk for examination by him. I don't know of my own knowledge whether he has examined that return or not prior to the time that he signs the oath to it. He may have read every item of the return. If there is not an item of $2000 on the return he did not tell me that he had received $2000 from Wesley Goswick on the 31st of December, 1927, or about that time. I did not know that Judge Shute had received $2000 from Wesley Goswick at that time. I obtained the amount of the deduction on the tax return of $529.00 paid for interest from Judge Shute. I don't know what that interest was paid on. I don't know whether that interest was paid on the mortgage on the Globe home place or not. I don't know because the income tax return does not require that that be itemized, and so I did not know what it was for. I asked him the amount of interest he had paid out during 1927, and he told me the whole amount. When I asked him for that information, I imagine he went over his check books for in the course of a few days he had it on my desk. I don't know whether it was a memorandum in writing or whether he just came by my desk and said, "Mrs. Parry, I paid out so much." This income tax re-

(Testimony of Alice Parry.)

turn was made up by me either in February or March, 1928. I simply did the clerical work in making up that return. I did not supply anything in the way of information other than that I figured the amount of the income tax of Judge Shute from the law firm of Armstrong, Lewis & Kramer for that year. So far as every other figure in that return is concerned, the information came from Judge Shute either directly or indirectly. I mean by indirectly I got it from his files or anyone that I knew was going around and I said, "Well, did you do this?" I did not [344] get any indirect information in regard to the time of the payment of the Noble note. I knew that he had paid it. I don't know when, but some time before I made up that income tax I knew he had paid the note. I suppose it was during 1927. The information was not given me by Judge Shute that the note was paid on February 27, 1928. I knew when I made up this income tax return that he had paid the Noble note and I wanted —he had a large income last year and I wanted to take all of the deductions that I could. I did not know when he had paid the Noble note, but I knew that there had been a lot of conversation around the office and we had been trying to get hold of Joe Noble to pay that note and I knew that Judge Shute finally had to go down to the bank and pay it himself. I don't know when I got this information that he had paid that note, but I know when I made up this income tax I was trying to find out all of the things that I could deduct on that return. Referring to the income tax return both of Judge Shute and Mrs. Shute for the year 1926—the duplicate of

(Testimony of Alice Parry.)

the returns—that is my handwriting. I supplied the information in regard to the return of a $2500 income from J. W. Bandauer from Judge Shute. I got the information in regard to the income of $400 reported in this 1926 income tax as amount received from the dwelling-house at Globe under the heading of "Rents and Royalties," from Judge Shute, and I got the information as to the taxes paid of $152.60 the same way. Referring to the 1925 income tax return. In that year there was no return made up for Mrs. Shute. I got the information that there had been $564.00 collected from the dwelling-house at Globe from Judge Shute.

Redirect Examination by Mr. MOORE.

I don't know whether the Noble note was paid from Judge Shute's bank account or Mrs. Shute's savings account. In placing the $1000 received from Goswick under the head of "Commission from Sales" in 1927 income tax, I thought that form would [345] best fit the situation.

TESTIMONY OF ARTHUR T. LA PRADE, FOR THE BANKRUPT.

(Being Called as a Witness for the Bankrupt.)

(Examination by Mr. MOORE.)

My name is Arthur T. La Prade. I am a practicing attorney in Phoenix.

Q. Mr. La Prade, this is an application by Judge Shute for discharge in bankruptcy. One of the grounds of opposition to discharge is that he withheld the sum of $250.00 which he deposited with you during the month of December, 1927, for the pur-

(Testimony of Arthur T. La Prade.)

pose of investment, and which, subsequent to the adjudication in bankruptcy, was returned to said bankrupt by said Arthur La Prade. Will you kindly explain that situation—that transaction that arose, briefly?

A. Well, it came up something like this. There was a man by the name of G. W. Cornelius, who at one time was principal of the Flagstaff Normal School and principal of the High school and City [346] Schools in Winslow. He was there when I was in college and, during my vacations, I became acquainted with him and he was quite a respected citizen in town and now a man about forty-two years of age or forty-three. Now, the last ten years he has been in California. Some time in the spring of 1927, he came through Winslow and told me that he had been working as a geologist and locator of oil wells, working for different oil companies. I told him that I was interested and I would like some time to become interested with him in some of his propositions. In the fall of 1927, he came down to Phoenix. At that time, he told me that he had purchased 2400 acres, I believe, of land in Texas; that he had paid something like $24,000.00 for it; that he had about $25,000.00 worth of oil drilling equipment on the tracks at Marfa, Texas; that he had run out of money and needed $10,000.00 to sink the well with. He and I talked about it quite a while and I suggested to him that I would raise the money for him by going out and getting a lot of my friends just to gamble with him and take a flyer for $250.00 apiece and we would raise $10,000.00, which would sink the well on his ground and with his equipment.

(Testimony of Arthur T. La Prade.)

I thoroughly believe that and I took him around and introduced him to Judge Shute and recommended him and also to Mr. Moore and Judge Struckmeyer and George Mickle and George Peter and, oh, any number of my friends around here, until I pledged about $7500.00. Some of the money was turned over to Cornelius direct and some of it was paid to me and by me turned over to Cornelius. It turned out, briefly, that Cornelius did not own the land, had not bought the land and did not have the oil-well rig equipment. I spent some $300.00 of my own money to send an investigator to Texas and found out that none of the representations that he had made were true and that he was an eighteen karat crook. I felt that I had been the unknown cause of my friends losing their money and that I had taken a man around to him that was not going to give them a run for their money and if he had drilled a dry hole, they would not [347] have had a kick coming, but he was crooking me and then from the beginning and they asked me what progress was being made and so I told them frankly what I had found out. "I don't feel right about it and I will reimburse every one of you men out of my own pocket," I said, so I went to the Valley Bank and borrowed the money and returned $250.00 to Judge Shute, $500.00 to Mr. Moore, $500.00 to George Mickle, $250.00 to McIntyre and, I don't know, quite a lot of them.

Cross-examination by Mr. NEALON.

I handled this matter as trustee—ran the account as trustee. I was going to be the sort of inter-

(Testimony of Arthur T. La Prade.)

mediary. I did not intend to turn over the $10,000.00 to him but to advance it to him as he went along. He was to drill the ground—the well on his ground. He had 2400 acres, was the date. We checkerboarded it and took a 160 here and there. He did not have the leases when he was talking to me. He later secured them quite a while after the transaction. I had an assignment when he did not have them and, when I started getting after them, he later made some sort of arrangement with somebody where the abstract of record shows that he did get an assignment but he owed nothing when he was talking to me. He was to drill his well on his own ground and he would own the well, but he was to give us a forty acre offset, so we were to have—I guess it was a thousand acres that we were to have on this 2400 acre plat. We were to own it as tenants in common. And, in that way, I was to hold the title of the ground as trustee. Of course, I told the fellows—I says that I am going to advance the money to him from time to time as he needs it. I held the money in a trust account. I deposited it "Arthur T. La Prade, Trustee." The last of that money was paid out by me before Christmas 1927. I did not collect the full amount of $10,000.00. [348] I had pledged $7500.00. I paid out to him $2,000.00, I think, and he collected either $500.00 or $750.00 and I retained a thousand that I did not pay to him. I don't remember when I exhausted the balance that was in the trustee account. When I thought that he had defrauded all of us I just went and drew on that thousand dollars that was left there and paid that out to four different members

(Testimony of Arthur T. La Prade.)

of them and then, some time after that, when it was convenient for me, I borrowed the money at the bank—I went to the bank and borrowed the money to pay the rest of them. I don't know whether Judge Shute was one of those four. I saw in the Record Reporter the fact that Judge Shute had gone into bankruptcy and it sort of shocked me to know that he was down in straits financially and I thought, "Well, if I am going to contribute to these fellows, now would be a good time to do it," and I just decided I would give him a contribution of $250.00 to help him out. I don't know whether he was the first one that I gave a check to. That is, that thought went through my mind, I remember. I don't know if there was some balance in that trust account at the time that I gave Judge Shute that check. I would have to have my check book on which I withdrew that money. I don't know whether there was a balance in that trust account on April 17 of last year, the date of Judge Shute's petition in bankruptcy. I don't know whether Judge Shute had any interest in that account or not. I may have paid his money directly over to Mr. Cornelius. You see, I paid Mr. Cornelius $500.00 one time, a thousand dollars another and, I think, $500.00 another time. That was for the whole bunch—for all that had subscribed. I paid the funds out as I collected it. I don't know whether I paid his money over or whether I turned his particular money over to Mr. Cornelius. I don't know that.

TESTIMONY OF JOSEPH E. NOBLE, FOR THE BANKRUPT.

(Witness for the Bankrupt.) [349]

(Examination by Mr. MOORE.)

My name is Joseph E. Noble. I have lived in Maricopa County about forty years. I have known Judge and Mrs. Shute since 1901. I have been closely associated in a friendly and social way during that time. I recall going to Judge Shute in 1927 and asking for a loan of $1200.00. When I asked him for it Walter or Judge Shute told me that he did not have it himself; that I would have to see Jessie. Jessie is his wife. And I was anxious to get the money and I asked Walter where she was; whether she was out at the house and he said he thought she was shopping in town and I might find her at Goldwaters, so I went up to Goldwaters and found her and took her into the rest-room there and told her the situation; that I would like to have some—this money and she said that she would let me have it. Judge Shute said something to me about Mrs. Shute having a savings account from which a loan might be made and also Mrs. Shute told me that she had it in a savings account and that they would have to get it from the savings, if they got it at all.

Q. State whether the arrangements were made at the bank for you to have that money on Judge Shute's endorsement, with Mrs. Shute's savings account as security? A. Yes, sir.

Mr. NEALON.—I object to that, if your Honor please. The note is in evidence—copy of the note.

(Testimony of Joseph E. Noble.)

There is no such condition attached to it. It is a plain note.

The COURT.—I have seen the note.

Mr. NEALON.—With the endorsement of Judge Shute and the record of the bank in evidence here as a part of this record and none of them show any security, other than that endorsement, and I don't think they can now testify contrary to the written instrument—the negotiable promissory note. [350]

The COURT.—This is not a suit on a note, though. This is meeting a specification in your objections, it seems to me, a question of concealment, false return, perjury. I overrule the objection.

A. Yes, we went to the bank—Oh, Mr. Washburn —I think he was assistant cashier—and Mr. Washburn suggested that I make a note direct to the bank and that he would, with Walter's endorsement, let me have the money, under the condition that they hold the savings account of Mrs. Shute as security collateral, so they could liquidate it or pay it off any time they wanted to out of the savings account.

Mr. MOORE.—Q. Did you ever pay that note, Mr. Noble?

A. I did not.

Q. Have you ever been able to pay it?

A. No, sir.

Q. What is your condition as to solvency?

A. I am insolvent. I haven't anything.

Q. Have you any prospect of ever being able to pay it?

A. Not unless I can strike, in my legal practice, something fortunate or lucky enough to do it.

(Testimony of Joseph E. Noble.)

Cross-examination by Mr. NEALON.

I would be glad to pay the note when I am able to. Mrs. Shute didn't sign, at the time that I obtained this money from the bank, any instrument in regard to the savings account. She was not there. Walter was not there either. I signed it at the time and I don't know when Walter endorsed it. I knew that that was the condition, though. I know that I signed it and he gave me the money right there but I don't remember whether Walter signed it then or later. I don't remember. He did not sign it before, I don't think. I don't remember whether Judge Shute was there when [351] I got the money or not but I know he and I went and talked to Washburn about it. And all there is to it is that I signed the note and got the money. That is now in evidence here and Judge Shute I assume would have to be a surety. He endorsed it. He was not a co-maker. On the 17th day of April, 1928, I recognized that I had an obligation to pay this note to Judge Shute. I recognized that from the time I made it. I have never denied that obligation.

TESTIMONY OF ORME LEWIS, FOR THE BANKRUPT.

(Witness for the Bankrupt.)

(Examination by Mr. MOORE.)

I have represented Judge Shute throughout his bankruptcy proceedings up until a short time ago, when you became associated with me. I have attended all of the hearings before the referee in

(Testimony of Orme Lewis.)

which Judge Shute was examined, with the exception of the ones, I believe, when they had a very short hearing and Mr. Armstrong attended. I recall having furnished the trustee with Judge Shute's checks, bank statements, statement from the firm of Armstrong, Lewis & Kramer as to his earnings, etc. Prior to April—May 29, I furnished a statement prepared by Mrs. Parry of the firm dividend to Judge Shute during the time that he had been connected with the firm and all of the available bank statements that Judge Shute had in his possession, all of his personal checks that he had in his possession, the check stubs and I believe that was all. They did not start in until November 5, 1925, I believe, that is, the checks. The bank statements, I believe, covered almost the entire period. There were a few missing that were later obtained from the bank. You asked the question whether I furnished those to Mr. Nealon; I saw to it that he received them. I do not recall whether or not I handed them to him myself or whether they were [352] taken over from Armstrong, Lewis & Kramer's office to his office. I do know that they were in his possession. Later on, Armstrong, Lewis & Kramer, by Robert Armstrong, furnished the original checks of the firm that had been drawn in favor of Judge Shute during this period. I have attended the examination of Judge Shute at which various sources of income were inquired into and explained as far as Judge Shute was apparently able to. From the bank statements, cancelled

(Testimony of Orme Lewis.)

checks, statements furnished by Armstrong, Lewis & Kramer and Judge Shute's examination on the stand, I prepared a statement showing his receipts and disbursements during the period from January 1, 1923, to November 5, 1925, and from January 16, 1924, to April 17, 1928, together with disbursements and amounts deposited and withdrawn and sources of income, as far as possible. This is a copy prepared from those sources and from information obtained from the First National Bank, where Judge Shute transacted his banking business, and that information that I obtained from the First National Bank was also disclosed by Mr. Sylvan Ganz in the examination before the referee. He was examined on that subject.

Whereupon Bankrupt's Exhibit "A" was admitted in evidence, without objection, as follows: [353]

BANKRUPT'S EXHIBIT "A."

Bankrupt's Exhibit *No.* A. Admitted and filed Jan. 10, 1929. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. Case No. B.–486–Phx. Geo. W. Shute.

RECEIPTS

and

DISBURSEMENTS

JANUARY 1, 1923, TO NOVEMBER 5, 1925.

Source of Information

RECEIPTS:

Exhibit "A" A. L. K.....$16,924.95

Exhibit "B"	Rent	300.00	
Exhibit "B"	Loans	350.00	
Exhibit "B"	Source Unavailable	464.34	
		$18,049.29	$18,049.29

DISBURSEMENTS:

No Records Available Annual Average for the 2 5/6 years .....$ 6,370.38

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NOVEMBER 5, 1925, TO APRIL 17, 1928.

RECEIPTS:

Exhibit "A"	A. L. K.....$26,665.79		
	Wentworth (Hudson Car Dec. 1927)	995.00	
Exhibit "B"	C. C. Julian (Sept. 1926)	5,000.00	
Exhibit "B"	Wes. Goswick (Dec. 1927)	2,000.00	
Exhibit "B"	Rent	250.00	
Exhibit "B"	Loans	475.00	
Exhibit "B"	Source Unavailable	2,407.50	
		$37,793.29	$37,793.29

	DISBURSEMENTS:		
Exhibit "B"	Personal Checks	$25,887.87	
	Cash to Mrs. Shute (9–26)	1,000.00	
	Cash to J. B. Armer	600.00	
Exhibit "B"	Cash to England (6–6–22)	1,534.10	
Exhibit "B"	Cash to Loan payments ..	631.57	
Exhibit "B"	Cash to J. M. S. Acc't	650.20	
		$30,303.74	$30,303.74
			$ 7,489.55
	Expenditures Unaccounted	$7,489.55	
Exhibit "C"	Cash Checks...	2,200.50	
	Total Cash Expended and not Accounted	$9,690.05	
	Yearly Average	$1,938.01	

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EXHIBIT "A."
ACCOUNTING.
JANUARY 16, 1924—APRIL 17, 1928.

1924.	Bank Deposits.		ALK. Receipts	Deposits Unacc't'd.	Cash Retained.
1.	$	Jan. 10.	$ 60.	$	$ 60.
2.	Jan. 16. 290.		390.		100.
3.	Feb. 2. 375.	Feb. 1.	375.		
4.	4. 50.			50.	
5.	Mar. 8. 437.50	Mar. 7.	437.50		
6.	Apr. 3. 150.	Apr. 2.	250.		100.
7.	16. 275.	16.	375.		100.
8.	23. 250.	23.	250.		
9.	24. 300.			300.	
10.	May 12. 275.	May 10.	375.		100.
11.	21. 600.	21.	750.		150.
12.	June 18. 275.	June 17.	225.		50.
13.	20. 150.			150.	
14	July 10. 225.	July 9.	225.		
15.	17. 50.			50.	
16.	24. 70.	24.	150.		80.
17.	Aug. 18. 50.	Aug. 9.	25.		25.
18.		15.	25.		25.
19.	18. 50.			50.	
20.	19. 475.	18.	475.		
21.	Sept. 17. 250.	Sept. 16.	300.		50.
22.		27.	50.		50.
23.	Oct. 3 137.50	Oct. 3.	137.50		
24.	18. 50.			50.	

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1924.		Bank Deposits.		ALK. Receipts	Deposits Unacc't'd.	Cash Retained.
25	Oct. 21.	300.	Oct. 21.	300.		
26.	Nov. 7.	200.	Nov. 5.	225.		25.
27.	10.	150.	10.	150.		
28.	13.	644.85			64.85	
29.	18.	50.			50.	
30	Dec. 8.	150.	Dec. 8.	150.		
31.	12.	137.50	12.	137.50		
32.	18.	50.			50.	
33.			23.	25.		25.
34.	24.	125.	23.	125.		
		5,962.35		5,987.50	814.85	840.
1925.						
35.	Jan. 5.	202.45	Dec. 31.	352.45		150.
36.	10.	450.	Jan. 12.	450.		
37.	19.	41.99			41.99	
38.	Feb. 7.	300.	Feb. 2.	300.		
39.	11.	750.	11.	750.		
40	Mar. 5.	150.	Mar. 5.	300.		150.
41.	20.	225.	19.	225.		
42.	Apr. 16.	375.	Apr. 13.	375.		
43.	20.	225.	20.	225.		
44.	30.	450.	24.	450.		
45.	May 11.	270.	May 11.	270.		
46	26.	450.	25.	450.		
47.	June 30.	57.50	June		57.50	
48.			June 17.	60.		60.
49.	July 1.	440.	30.	540.		100.
50.	14.	100.	July 13.	150.		50.
51.	31.	150.	30.	150.		

1924.		Bank Deposits.			ALK. Receipts	Deposits Unacc't'd.	Cash Retained.
52.	Aug. 12.	50.	Aug.	12.	50.		
53.	Sept. 5.	200.				200.	
54.	10.	250.	Sept.	10.	400.		150.
55.			Oct.	8.	75.		75.
56.	Oct. 8.	225.		8.	225.		
57.	27.	150.		27.	150.		
58.	Nov. 7.	375.	Nov.	7.	375.		
59.	Dec. 12.	450.	Dec.	12.	450.		
60.	28.	50.		28.	50.		
		6,386.94			6,822.45	299.49	735.
1926.							
61.	Jan. 2.	263.14	Dec.	31.	263.14		
62.	7.	175.				175.	
63.	9.	175.				175.	
64.	16.	180.	Jan.	16.	180.		
65.	22.	500.				500.	
66.	Feb. 6.	750.	Feb.	6.	750.		
67.	25.	225.		24.	225.		
68.	Mar. 9.	125.	Mar.	9.	225.		100.
69.	26.	900.		25.	900.		
70.	Apr. 23.	450.	Apr.	23.	450.		
71.	29.	200.		27.	300.		100.
72.	May 24.	150.	May	24.	300.		150.
73.	June 1.	200.		29.	300.		100.
74.	18.	450.	June	17.	450.		
75.	July 1.	50.		30.	50.		
76.	13.	325.	July	13.	325.		
77.	17.	45.				45.	
78.	Aug. 12.	45.				45.	
79.	17.	125.	Aug.	16.	225.		100.

	1926.	Bank Deposits.		ALK. Receipts	Deposits Unacc't'd	Cash Retained
80.	Aug. 24.	50.	(Aug.)		50.	
81.	27.	200.	27.	300.		100.
82.	Sept. 11.	500.			500.	
83.	17.	3,400.			3,400.	
84.	21.	175.		675.		500.
85.	Oct. 13.	750.	Oct. 11.	750.		
86.	Nov. 15.	200.	Nov. 15.	300.		100.
87.	22.	300.	22.	300.		
88.	Dec. 14.	100.	Dec. 14.	225.		125.
89.	14.	62.50			62.50	
90.	21.	50.			50.	
91.	23.	375.	23.	375.		
92.	29.	100.			100.	
		11,595.64		7,868.14	5,102.50	1,375.
	1927.					
93.	Jan. 3.	122.45	31.	222.45		100.
94.	4.	725.	Jan. 3.	825.		100.
95.	21.	750.	21.	750.		
96	Feb. 17.	250.	Feb. 16.	450.		200.
97.	23.	50.			50.	
98.	Mar. 8.	450.	Mar. 8.	450.		
99.	Apr. 5.	275.			275.	
100.	12.	475.	Apr. 11.	675.		200.
101.	27.	250.	27.	450.		200.
102.			June 6.	150.		150.
103.	June 6.	500.	6.	5,850.		5,350.
104.	7.	465.90			465.90	
105.	11.	200.	9.	300.		100.
106.	24.	2,968.43			2,968.45	
107.	July 11.	500.	July 6.	500.		

1927.		Bank Deposits.			ALK. Receipts	Deposits Unacc't'd.	Cash Retained.
108	(July)		(July)	6.	375.		375.
109		21. 375.		21.	375.		
110				21.	300.		300.
111	Aug.	22. 295.				295.	
112	Sept.	2. 500.				500.	
113		26. 250.	Sept.	26.	500.		250.
114	Oct.	10. 250.	Oct.	10.	250.		
115		28. 250.		25.	250.		
116	Nov.	9. 375.	Nov.	8.	375.		
117		17. 400.		16.	400.		
118		26. 625.		25.	825.		200.
119	Dec.	5. 200.				200.	
120		19. 250.	Dec.	19.	750.		500.
121		20. 50.				50.	
122		23. 100.				100.	
123		31. 1,900.				1,900.	

1927.		Bank Deposits.		ALK. Receipts	Deposits Unacc't'd.	Cash Retained.
124			31.	118.33		118.33
125			31.	331.87		331.87
		13,801.78		15,472.65	6,804.33	8,475.20
1928.						
126	Jan.	17. 50.			50.	
127		26. 150.	Jan.	26. 300.		150.
128	Feb.	8. 100.			100.	
129		20. 550.	Feb.	16. 750.		200.
130		28. 100.			100.	
131	Mar.	15. 625.	Mar.	14. 625.		
132			Apr.	6. 50.		50.
133	Apr.	9. 200.			200.	
134		11. 250.		10. 575.		325.
135.				10. 150.		150.
		2,025.		2,450.	450.	875.

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	Bank Deposits	ALK Receipts.	Unacc't'd Deposits.	Cash Retained.
1924	$5,962.35	$ 5,987.50	$ 814.85	$ 840.00
1925	6,386.94	6,822.45	299.49	735.00
1926	11,595.64	7,868.14	5,102.50	1,375.00
1927	13,801.88	15,472.65	6,804.33	8,475.20
1928	2,025	2,450.00	450.00	875.00
	$39,771.71	$38,600.74	$13,471.17	$12,300.20

Total Income $52,061.91
Annual 12,249.88

EXHIBIT "B"

EXPLANATION SHEET.

1924.

4 Feb. 4. $ 50. deposit unaccounted. Rent from Globe House.
9 Apr. 24. $300. deposit unaccounted.
13 June 20. $150. deposit unaccounted. Borrowed from F. N. B. A.
15 June 17. $ 50. deposit unaccounted. Rent from Globe House.
19 July 18. $ 50. deposit unaccounted. Rent from Globe House.
24 Oct. 18. $ 50. deposit unaccounted. Rent from Globe House.
28 Nov. 13. $ 64.85 deposit unaccounted.
29 Nov. 18. $ 50. deposit unaccounted. Rent from Globe House.

32 Dec. 18. $ 50 deposit unaccounted. Rent from Globe House.

1925.

37 Jan. 19 $ 41.99 deposit unaccounted.

47 June 30. $ 57.50 deposit unaccounted.

53 Sept. 5 $200. deposit unaccounted. Borrowed from F. N. B. A.

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(EXPLANATION SHEET.)

1926.

62 Jan. 7. $175. deposit unaccounted.

63 Jan. 9. $175. deposit unaccounted.

65 Jan. 22. $500. deposit unaccounted.

77 July 17. $ 45. deposit unaccounted.

78 Aug. 12. $ 45. deposit unaccounted.

80 Aug. 24. $ 50. deposit unaccounted. Rent from Globe House.

82 Sept. 11. $500. deposit unaccounted. Part of $5,000 received from C. C. Julian. Of the balance, $1,000 was given to Judge Shute's Mother in Cash.

83 Sept. 17. $3,400 deposit unaccounted.

89 Dec. 14. $ 62.50 deposit unaccounted.

90 Dec. 21. $ 50. deposit unaccounted. Rent from Globe House.

92 Dec. 29. $100 deposit unaccounted.

1927.

97 Feb. 23. $ 50. deposit unaccounted. Rent from Globe House.

99 Apr. 5. $275. deposit unaccounted. Borrowed from F. N. B. A.

103 June 6. $5,350. cash retained.

These transactions arise out of the $5,850.00 check. This check was used for the following purposes:

1.	Deposit of June 6th	$ 500.00
2.	Payment of note	275.00
3.	Payment of interest	3.79
4.	Payment of note	100.00
5.	Payment of interest	2.78
6.	Purchase cashier's check No. 37948	2,000.00
7.	Purchase cashier's check No. 37948	2,968.43
	Total	$5,850.00

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The $2,000.00 cashier's check was given to A. E. England by Judge Shute as payment on account and for a car. In return Judge Shute was given change in the form of a check in the amount of $465.90 which is item 104 herein.

104 June 7. $465.90 deposit unaccounted. Accounted for in item 103.

106 June 24. $2,968.43 deposit unaccounted. Accounted for in item 10.

110 July 21. $300.00 cash retained. $100.00 deposited to J. M. S. savings. July 21, 1927.

111 Aug. 22. $295.00 deposit unaccounted.

112 Sept. 2. $500.00 deposit unaccounted.
119 Dec. 5. $200.00 deposit unaccounted.
121 Dec. 20. $50.00 deposit unaccounted. Rent on Globe House.
122 Dec. 23. $100.00 deposit unaccounted. Borrowed from Mrs. Shute's Savings acc't.
123 Dec. 31. $1,900 deposit unaccounted. Portion of $2,000 received from Goswick.
124 Dec. 31. $118.33 cash retained.
125 31. $331.87 cash retained.

(These two checks were given (to Mrs. Shute together with (the balance of $100 from item (#123 and Judge Shute's (check for $500, payable to ("Yourselves" drawn Jan. 4, (1928. The total am't consti- (tutes Mrs. Shute's Jan. 4, (1928, Savings acc't deposit (of $1,050.20.

1928.

126 Jan. 17. $50.00 deposit unaccounted. Rent on Globe House.
128 Feb. 8. $100.00 deposit unaccounted. Borrowed from F. N. B. A.
130 28. $100.00 deposit unaccounted.
133 Apr. 9. $200.00 deposit unaccounted.

The above explanation shows the total amount of income for which no accounting can be made to be $2,861.34. This same amount will be shown on the balance sheet as $464.34 for the period of January

1, 1923, to November 5, 1925, and $2,407.50 for the period November 5, 1925, to April 17, 1928.

Some of these amounts found in the year 1928, undoubtedly [363] arise out of the $995.00 received by Judge Shute on account of the Wentworth car, as the money he received came in three cash payments aside from the original payment of $400.00 in the form of a cashier's check which was turned directly over to A. E. England. However these amounts have not been taken into consideration in the balance sheet so it may be well believed that the $995.00 is accounted for twice, i. e., once in its own name and under the head "Source Unavailable." This is probably true of other items where money was retained by Judge Shute for the purpose of a loan or something similar and later deposited without any way of accounting for its source.

On the sheet entitled "RECEIPTS & DISBURSEMENTS," under the heading disbursements, in the second part of the item entitled "Cash to Loan payments $631.50," is made up of the following items which are payments made to the First National Bank of Arizona:

January 19, 1923	(Principal)	$150.00
June 6, 1927	(Principal)	275.00
	(Interest)	3.79
	(Principal)	100.00
	(Interest)	2.78
December 19, 1927	(Principal)	100.00
	TOTAL	$631.57

The item "Cash to J. M. S. account $650.20" is made up of the following amounts deposited to Jessie M. Shute Savings Account:

July 21, 1927	$100.00
December 31, 1927	118.33
	331.07
January 4, 1928	100.00
	$650.20

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EXHIBIT "C."

G. W. S. "CASH" CHECKS.

1925.	Drawn to.	Amount	
Nov. 7.	Cash	$ 10.00	
14.	Cash	10.00	
	Cash	50.00	
20.	Cash	5.00	
24.	Cash	20.00	
		$ 95.00	$ 95.00
Dec. 15.	Nat'l Bank Ariz.	5.00	
12.	Cash	175.00	
	Cash	5.00	
26.	Cash	5.00	
29.	Bearer	2.00	
		$192.00	$192.00
			$287.00

TOTAL YEAR 1925.

1926.			
Jan. 7.	Self	$ 10.00	
11.	Bearer	1.00	
12.	Cash	2.50	
16.	Cash	10.00	
	Cash	5.00	
		$ 28.50	$ 28.50
Apr. 24.	Self	$ 20.00	$ 20.00
		$ 20.00	$ 20.00

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1926.	Drawn to.	Amount.	
May 5.	Cash	$ 10.00	
8.	Cash	10.00	
11.	Cash	5.00	
15.	Cash	15.00	
24.	Cash	5.00	
		$ 45.00	$ 45.00
June 1.	Cash	$ 5.00	
3.	Yourselves	2.50	
8.	Cash	5.00	
14.	Cash	1.00	
	Cash	1.15	
18.	Cash	150.00	
19.	Self	10.00	
24.	Self	5.00	
26.	Cash	10.00	
		$189.65	$189.65

July 3.	Self	$ 5.00	
13.	Cash	50.00	
		$ 55.00	$ 55.00
Aug. 30.	Self	$ 5.00	
		$ 5.00	$ 5.00
Sept. 20.	Cash	$ 5.00	$ 5.00
		$ 5.00	
Oct. 22.	Cash	$ 5.00	
		$ 5.00	$ 5.00
Nov. 16.	Self	$ 5.00	
	Cash	5.00	
26.	Cash	5.00	
		$ 15.00	$ 15.00

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1926.	Drawn to.	Amount.	
Dec. 1.	F. N. B. A.	$ 2.50	
23.	Cash	10.00	
27.	Self	10.00	
	Cash	15.00	
29.	Cash	10.00	
		$ 47.50	$ 47.50
	TOTAL YEAR 1926.		$415.65

1927.			
Jan. 13.	Bearer	$ 4.00	
24.	Cash	10.00	
25.	Cash	20.00	
27.	Cash	10.00	
28.	Cash	50.00	
		$ 94.00	
Feb. 1.	Cash	$ 25.00	
5.	Cash	10.00	
12.	Self	25.00	
19.	Cash	10.00	
22.	Cash	10.00	
23.	Self	5.00	
26.	Cash	10.00	
	Yourselves	2.50	
		$ 97.50	$ 97.50
Mar. 12.	G. W. Shute	$ 25.00	
31.	Cash	10.00	
		$ 35.00	$ 35.00
Apr. 5.	Cash	$ 25.00	
18.	Cash	50.00	
30.	Cash	10.00	
		$ 85.00	$ 85.00

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1927.	Drawn to.	Amount.	
May 2.	Bearer	$ 2.00	
3.	Cash	10.00	
13.	Cash	20.00	
19.	Cash	10.00	
28.	Cash	5.00	
		$ 47.00	$ 47.00
June 4.	Cash	$100.00	
16.	Cash	5.00	
18.	Cash	10.00	
23.	Cash	5.00	
24.	Cash	5.00	
25.	Cash	10.00	
30.	Cash	5.00	
	Cash	50.00	
		$ 90.00	$ 90.00
July 2.	Cash	$ 20.00	
9.	Cash	5.00	
13.	Cash	5.00	
15.	Cash	20.00	
23.	Cash	10.00	
27.	Cash	10.00	
29.	Cash	10.00	
		$ 80.00	$ 80.00
Aug. 1.	Cash	$ 5.00	
3.	Cash	5.00	
4.	Cash	50.00	
	Cash	3.00	

1927.	Drawn to.	Amount.	
10.	Cash	3.00	
16.	Cash	5.00	
17.	Cash	10.00	
18.	Cash	2.30	

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1927. (Aug.)	Drawn to.	Amount.	
24.	Cash	$5 .00	
	Cash	5.00	
	Cash	20.00	
25.	Cash	3.00	
26.	Cash	10.00	
29.	Cash	7.00	
30.	Cash	50.00	
		$183.30	$183.30
Sept. 23.	Cash	$ 5.00	
30.	Self	25.00	
		$ 30.00	$ 30.00
Oct. 17.	Cash	$ 1.25	
22.	Cash	10.00	
28.	Cash	100.00	
		$111.25	$111.25
Nov. 9.	Cash	25.00	
10.	Cash	10.00	
15.	Cash	10.00	
17.	Cash	150.00	
18.	Cash	1.30	

1927.	Drawn to.	Amount.	
19.	Cash	25.00	
29.	Cash	10.00	
	Cash	300.00	
		$531.30	$531.30
Dec. 5.	Cash	$ 3.50	
		$ 3.50	$ 3.50
	TOTAL YEAR 1927		$1,387.85

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1928.	Drawn to.	Amount.	
Jan. 3.	Cash	$ 20.00	
7.	Cash	10.00	
18.	Cash	10.00	
21.	Cash	10.00	
		$ 50.00	$ 50.00
Feb. 2.	Cash	$ 10.00	
4.	Cash	10.00	
8.	Cash	5.00	
		$25.00	$ 25.00
Mar. 9.	Cash	5.00	
17.	Cash	20.00	
23.	Cash	5.00	
		$ 30.00	$ 30.00
Apr. 4.	Cash	5.00	
		$5.00	$ 5.00
			$ 5.00
	TOTAL		$2,200.50

G. W. S. CASH CHECKS USED FOR PARTICULAR PURPOSES.

1925.		Drawn to.	Amount.	Purpose.	
Nov.	17.	Yourselves	$ 75.00	Rent.	
Dec.	21.	Yourselves	75.00	Rent.	
			$ 150.00		$ 150.00

[370]

1926.		Drawn to.	Amount.	Purpose.	
Jan.	18.	Yourselves	$ 75.00	Rent.	
Apr.	23.	Yourselves	75.00	Rent.	
May	28.	Yourselves	75.00	Rent.	
June	18.	Yourselves	75.00	Rent.	
Aug.	27.	Yourselves	75.00	Rent.	
Sept.	20.	Yourselves	75.00	Rent.	
Oct.	20.	Yourselves	75.00	Rent.	
Nov.	24.	Yourselves	75.00	Rent.	
Dec.	20.	Yourselves	75.00		
			$675.00		$ 675.00
1927.					
Jan.	21.	Yourselves	75.00	Rent.	
Feb.	18.	Yourselves	75.00	Rent.	
Apr.	5.	Yourselves	75.00	Rent.	
	18.	Yourselves	75.00	Rent.	
June	10.	Yourselves	75.00	Rent.	
	24.	Yourselves	500.00	Deposit J. M. S. Savings Acc't.	
Aug.	22.	Yourselves	50.00	Deposit J. M. S. Savings Acc't.	

1927.		Drawn to.	Amount.	Purpose.
Sept.	2.	Yourselves	$100.00	Deposit J. M. S. Savings Acc't.
Nov.	17.	Yourselves	100.00	Deposit J M. S. Savings Acc't.
			$1,125.00	$1,125.00
1928.				
Jan.	4.	Yourselves	$ 500.00	Deposit J. M. S. Savings Acc't.
Apr.	10.	Yourselves	100.00	Payment Loan to F. N. B. A.
			$600.00	$ 600.00

[371]

(Testimony of Orme Lewis.)

Bankrupt's Exhibit "A," which has just been admitted in evidence, is a copy of an exhibit that was introduced in evidence in a hearing before the referee in December. It was December 28. Mr. Nealon had the checks, bank statements and other statements in his possession varying lengths of time. To begin with, he had, as I stated before, May 29, the bank statements that were available, cancelled checks—personal checks of Judge Shute, statement of dividends from Armstrong, Lewis & Kramer and, then, later, he obtained from Robert Armstrong the Armstrong, Lewis & Kramer checks cancelled that were paid to Judge Shute, both for expenses and as dividends, and those checks were given to him, if I am not mistaken, along in the latter part of November. You see, the way the thing was handled, this information was all in Armstrong, Lewis & Kramer's office and there was an arrangement by which those books and records of Armstrong, Lewis & Kramer were available to the trustee.

Mr. MOORE.—Q. May 1, 1927, you volunteered to Mr. Nealon to furnish him all information available and to explain any item, as far as possible, and to get him in conference with Judge Shute to go over all of his records and that the books of Armstrong, Lewis & Kramer were open to his inspection?

A. That is true. You see, since Judge Shute had merely checks, statements and stubs, there were many things that he could explain that a person

(Testimony of Orme Lewis.)

reading them could not understand and, for that reason, there were three hearings in May. At those short May hearings, Judge Shute and I stated that we would be glad to furnish information as to any item as it came up, because—I think it was the examination of May 29—Mr. Nealon started to examine individual checks and we all realized it was going to be a pretty slow procedure that way and we just agreed that he could call up Judge Shute or call up myself and we would come over and explain to him just what a check was for whenever he asked or what an item [372] on the deposits—on the bank statements was for.

Q. Mr. Lewis, have you yourself and, to your knowledge, Judge Shute, at all times been ready and willing and have offered to co-operate with the trustee in working up a statement from the documents submitted? A. We have.

Q. Well, what response have you got from such overtures?

A. Well, while we did offer to help them—give them information, we were called on, if at all, very, very seldom for information on that subject but it was given at the times that it was called for. If I may go on a little bit further, this statement that was prepared was prepared due to the fact that we felt there should be some explanation and, as we had not been called on for it for quite a while, I then asked Mr. Nealon for this data that I had given him to be returned temporarily, so that I could make up a statement, so that some explanation

(Testimony of Orme Lewis.)

could be made. I could not even determine it without going over each check and deposit and all that. It brought to my mind things that I did not know about that Judge Shute did not recall until they were forced on his attention by some particular item standing out.

Q. Did you have any difficulty in getting those items from the hands of the trustee?

A. Well, it took most of the summer.

Cross-examination by Mr. NEALON.

Q. Mr. Lewis, the Armstrong, Lewis & Kramer checks were produced in court in response to an order requiring the firm and its representatives to produce those records in court, were they not?

A. No, Mr. Nealon. If you will read the testimony at that hearing, you will notice that Mr. Armstrong stated specifically that he was appearing there merely to give you the aid and that he [373] was not appearing in response to the order.

Q. But the order had been made and the referee had ruled that it was sufficient prior to that time, had he not?

A. He had ruled that it was sufficient but Mr. Armstrong still did not respond to the order.

Q. He appeared in court as the representative of Armstrong, Lewis & Kramer?

A. And made a statement when he—

Q. But he appeared in court, Mr. Lewis? Please answer the question. A. He did.

Q. And Mrs. Parry, who signed the checks as

(Testimony of Orme Lewis.)

cashier, also appeared in court in response to the order, did she not? A. That is right.

Q. And they had the checks with them in court at that time? A. They did.

Q. Up to that time, no checks of Armstrong, Lewis & Kramer had been delivered to the trustee?

A. No.

Q. And at that time there was considerable objection made by Mr. Robert Armstrong to a delivery of the checks and finally arranged that they should be delivered to me; is that not correct?

A. No, that is not correct.

Q. All right, state exactly what happened, then.

A. Mr. Armstrong did not wish to give the checks into the possession of the court, as they constituted the only record of Armstrong, Lewis & Kramer. He stated at that time that he would be very glad to leave them there for the purpose of copies being made or to turn them over to you to study individually, which he did.

Q. Then, Judge Shute made the suggestion, did he not, that the checks themselves be left in my possession? [374]

A. I don't recall whether Judge Shute made that statement but perhaps he did. It was something of that sort. They were left in your possession, I know.

Q. Now, I wish to refresh your memory, Mr. Lewis, in regard to the leaving of the check stubs with me. You will recall, do you not, that there were only two packages of check stubs left in the

(Testimony of Orme Lewis.)

first instance and that subsequently, on my calling either your attention to it or Judge Shute, the checks up to April 17 were produced and turned over to me?

A. I do not recall that definitely but I can see how it would have happened. The checks that were in his present check book that he was using at the time were not delivered. Perhaps that is true.

Mr. MOORE.—Q. You mean the stubs?

A. The stubs.

Mr. NEALON.—Q. Now, you say that it took practically all summer to get those checks from me?

A. Yes.

Q. Isn't it a fact that you and I and Miss Birdsall each accommodated one another as far as possible in the examination of the checks?

A. That is possibly true but, at the same time, my statement still stands as I made it.

Q. Now, the statement was made to you, at the time that you first asked for the checks, that Miss Birdsall was having them listed?

A. That is correct.

Q. And that as soon as they were returned to me they would be turned over to you? A. Yes.

Q. I did turn them over to you and you had them in your possession for several weeks, did you not? [375] A. That is true.

I have stated that it took me eight or ten weeks to prepare the statement which has just been introduced after the checks were turned over to me, but there is an explanation for that. The explanation

(Testimony of Orme Lewis.)

would be that unfortunately and I don't know just why, but the bank statements were not delivered to me at the same time as the checks. I think that was occasioned by the fact that Miss Birdsall was out of town and I did not get those for quite a while, and I was not able to prepare it until [376] much later on account of that. It may be that you gave me every facility for examination of the checks and preparation of any statement that I wanted to make, but at the same time it was not very fast. I believe I have a record of the time those checks were turned over to me. I do not like to state just out of memory the exact date. At a later period I furnished the missing checks and bank statement. Judge Shute was cleaning his office and he found in a desk a few checks. I believe there were probably about forty checks and four or five bank statements—monthly bank statements—but, while the checks—I turned the checks and the bank statements over to you immediately but I found that in the meantime you had replaced these missing bank statements with the ones from the bank, so it was not necessary for me to use them. You had prepared a copy of the missing bank statements, but you did not have the checks, that is true. I could not state whether quite a number of the check stubs were missing too. I haven't made any statement at any time that these checks were turned over to you other than as I said in May. Obviously those could not have been turned over to you prior to May 16th since Judge Shute was drawing checks there

(Testimony of Orme Lewis.)

as late as May 16th before any were given to you. I really don't recall whether as a matter of fact they were not turned over until after May 29th when you asked for them. In my examination of all of these check stubs, checks and bank account, I did not find an absolutely complete report of the receipts of Judge Shute, but it was quite complete. It was not absolutely complete, I will admit that. It is correct that this statement I have made up was introduced before the Referee on December 27, 1928. I will not say that up to that time most of the information contained therein had not been furnished either to the trustee or made available in the court examinations. Every bit of the information that appears there was obtained by me from materials furnished to you by me from the [377] First National Bank and from a few questions asked of Judge Shute. Referring to the receipt by Judge Shute of $5,000—$10,000, rather—from C. C. Julian, and the payment by him of $5,000, I won't answer directly your question that that item had never been revealed to you as trustee by me, Judge Shute or anybody representing Judge Shute that I know of prior to that time. I have a story to tell around that question. I cannot answer it in that way. You are correct that Judge Shute testified at that hearing that that information had not been testified to before that time as to the Julian money. My story is this: When I went over this statement or, rather, when I went over the materials and tried to make up this statement, I went over

(Testimony of Orme Lewis.)

all of the deposits that showed on Judge Shute's account and saw one lump of $3400.00, the largest deposit ever made by Judge Shute, and I could not think what it was for. I put it down as a source unaccounted and I had two or three other small items and I talked to Judge Shute and I said, "What could a $3400.00 deposit on such and such a day and $500.00 deposited to Mrs. Shute's savings account at approximately the same time mean? I don't see where you got it." And he said, "I know what that is and that is where the story came out. It took things like that—It took going into the record that way at private to remind a person of things. I don't recall that Miss Birdsall made an exhaustive examination of Judge Shute in regard to that $3400.00 item. I don't believe she did. I think she did make quite an examination about the $3,000 paid to Mrs. Holmes at about that time. I don't recall how it was explained or that no revelation was made of the source from which this money was obtained. I know that at that time there wasn't any statement made of the Julian money.

Q. And didn't Judge Shute testify in those hearings that he had not received any large amount from any other source than the firm of Armstrong, Lewis & Kramer? [378]

A. Shall I retestify to all that is in the record? Do I have to?

Q. I am asking you a question, Mr. Lewis.

A. Well, you are covering everything that is

(Testimony of Orme Lewis.)

in the record all of the way through. Do I have to go on and answer these questions?

Q. You know whether he testified, in answer to that one question, or not, do you?

A. He certainly did.

Q. And he testified that he had not received any other large amounts, did he not?

A. Well, I don't remember the exact words of it. [379]

Q. Now, Mr. Lewis, showing to you this statement, Bankrupt's Exhibit "A," will you show me on that statement where among the receipts is shown the sum of $500 received from Wesley Goswick in June of 1927—a thousand—sum of $1,000.00, instead of $500.00, received from Wesley Goswick by Judge Shute in June of 1927?

A. At the time this statement was made up, there were certain items listed in here for which the source was unaccounted. Afterwards, it appears, on August 22 of 1927, Judge Shute deposited $295.00. On September 2, he deposited $500.00.

Q. I am asking you about where you show in that account. A. There is where it is shown.

Q. I call your attention to your recapitulation on page 1 of your receipts and ask you if it shows in there at all? A. Yes.

Q. Show it.

A. All right, sources unavailable $2,407.50.

Q. That is receipts the source of which is unavailable?

A. In other words, I could not find out at the

(Testimony of Orme Lewis.)

time where it came from. Since that time, we have found out this $295.00 deposited and this $500.00 deposited and, in talking with Wesley Goswick and other people, we have found out where that money came from, so it shows in there.

Q. So you got your information of this from Wesley Goswick and other people outside; is that right?

A. That is right and, for that reason, it does not appear in there as the information from which—in which the source is mentioned. You will notice it is source unaccounted but it is sufficient to cover the amount that you are asking about.

Q. Now, let me ask you if, in the examination of the bankrupt, special attention was not called to this item of $1,000.00 and his report thereof in the income tax return of 1927?

A. I don't remember. I remember talking about the income tax [380] return but I don't remember there was talk about the thousand dollars otherwise.

Q. But you remember seeing that item in the income tax return, did you not?

A. Yes, that is the first time it occurred to me.

Q. So you did have available that source of information at the time you made up this statement, Mr. Lewis, did you not?

A. Had available that source but I will be very frank and say that I omitted to use the income tax statement but I could have explained those amounts.

Q. There were two other $500.00 items received from Mr. Goswick that are not explained in this

(Testimony of Orme Lewis.)

statement, are there not—received by Judge Shute, I mean? A. I don't know.

Q. You did not hear Judge Shute testify to that?

A. I don't recall. They testified—

Q. I mean at the referee's hearings.

A. Do you mean that Judge Shute testified that he got two other $500.00 items aside from this thousand dollar item?

Q. Yes.

A. I don't remember it. It is probably there, if you say so, but I don't recall it myself.

Q. He never did testify that he had received this $1,000.00 item, did he? A. Let me see—

Q. In any hearing.

A. No, in no hearing and never to me.

Q. But he did testify to $500.00 being given to him as a gift by Mr. Goswick after he had been up there and rendered some service in getting the optionee off of the property under the first option that has been testified to here in the courtroom?

A. Yes, I think—I don't remember; there is so many $500.00 [381] testified about in regard to these payments by—

Q. Now, let me ask you if he did not testify to another $500.00 received from Wesley Goswick after the sale of timber and other materials on some claims up there?

A. I don't have the slightest recollection of that.

Q. So that, if that source of information is in this record, you did not consider it in making up the statement of receipts; is that right?

(Testimony of Orme Lewis.)

A. You will notice that there is certain information there that is put down as source unavailable. That is put down when the information around which—Strike that. That is put down—Although you might consider something a source, still it would be unwise to consider it a source, because it might be a mistake, so that is put down as source unavailable. Now, you can tie those things up. I may not tie a lot of them very beautifully for you. You can hand me the paper and I can tie them all all of the way through so there won't be any source unavailable but I don't think it will be fair to do it.

Q. Wouldn't you consider the testimony of your own client a proper thing to consider in making up a financial statement for him?

A. You see, where you find a deposit in the bank of, say $500.00, on a certain date and say Judge Shute has testified that he received $500.00 from someone, the date is not exact. Nobody seems to know whether it was before or after that deposit. It is best to leave it source unavailable, and, then, if you want to, you can accumulate these sums that have been received and check them against these deposits and you will find you will come out approximately.

Q. How much aid is a statement of that kind to trustee in collecting in the assets of the estate?

Mr. MOORE.—It seems to me we are getting pretty far afield [382] asking Mr.—

(Testimony of Orme Lewis.)

Mr. NEALON.—That is the object of a statement, as I understand it.

The COURT.—Doesn't the statement speak for itself, don't you think?

Mr. NEALON.—I don't think it does, if your Honor please.

The COURT.—You are asking him to express an opinion as to how far it would enable the trustee to proceed.

Mr. NEALON.—Well, I have my opinion of that.

A. Well, I would like to answer that question. For myself, I don't think that is useful at all in bringing money in to the trustee. Not at all but I think that is probably useful in satisfying the trustee about the whole account. In other words, Judge Shute kept no account. You asked no questions on some of those points. I thought, out of consideration for you and out of consideration for Judge Shute and everybody concerned, that it would be very handy for everyone if we had some sort of statement that we could refer to. Therefore, that was prepared.

Q. Now, Mr. Lewis, this is not prepared as a statement showing his receipts and disbursements but rather as a reconcilement of his bank account; isn't that true?

A. No, I won't say that is true, because there are items in there that don't even appear in his bank account.

Q. Well, where do they appear?

(Testimony of Orme Lewis.)

A. They may appear in his savings account or they may appear in his testimony.

Q. In the savings account of Mrs. Shute?

A. Yes. You will notice quite a list there on the first page.

Q. Now, did you intend that, when you referred to a number of checks having been deposited in her account of the earnings of Judge Shute while a member of the firm of Armstrong, Lewis & Kramer —that the mere deposit of those checks in her account [383] accounted satisfactorily for loss of assets or Judge Shute's inability to meet his financial obligations?

A. I intended that just as you say.

Q. Can you tell me how we could tell, from the bank-books and deposits, in connection with the testimony of Judge Shute at the various hearings before the referee, the source of the $1900.00 deposit of December 31, 1927, is explanation showing that that was made up of many other amounts rather than the $2,000.00 check of Wesley Goswick, which now appears to be—

A. Mr. Nealon, if you will recall, at the meeting of creditors on December 27, when that statement that you have, Exhibit "A," was introduced in evidence, I realized that there were certain items on there about which explanations had not been made and testimony was given at that hearing to explain those few items of which a satisfactory explanation had not been heretofore made and which information I felt that you should have for the purpose of understanding the statement.

No. 5949

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

THOMAS W. NEALON, Trustee, and J. J. MACKAY, Creditor,

Appellants,

vs.

GEORGE W. SHUTE, Bankrupt,

Appellee.

Upon Appeal from the United States District Court for the District of Arizona.

VOLUME II.

(Pages 433 to 894, Inclusive.)

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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(Testimony of Orme Lewis.)

Q. Now, there is a direct contradiction between this statement and the testimony of Judge Shute at the various hearings, is there not?

A. I presume the record will show.

Q. Didn't Judge Shute testify definitely to various items going to make up the $1900.00 deposit on December 31, 1927?

Mr. MOORE.—Your Honor, I think this is going too far to examine this witness as to what Judge Shute testified before a certain hearing.

The COURT.—Well, if he doesn't remember, he may call for the report. I really don't see that it is material to ask this witness what he testified to from the record. It speaks for itself.

Mr. NEALON.—He has put in a statement which I presume is intended to explain satisfactorily the disappearance of assets and this statement was first produced eight days after the filing of [384] the specifications of objections in here. Now, the trustee was entitled to any information that the bankrupt had it could get at the time of his filing his petition in bankruptcy. It was his duty to have ascertained that fact.

The COURT.—That is not the point. You are asking this witness to state what Judge Shute testified to at the examination.

Mr. NEALON.—Well, merely because it contradicts this statement—the statement that this witness has produced and I think I have a right to do that and it goes to the credibility of this statement.

(Testimony of Orme Lewis.)

The COURT.—The statement itself is not binding upon the referee—I mean to say the trustee. It is merely a memorandum made to enable the trustee and now the Court to more readily examine the record and aid in a decision of the matter before the court. It is not offered as an absolutely correct statement, as I understand it. I do not have any objection to him answering these questions, if he can do so, but it is asking a lot of a witness to remember just exactly what another witness testified, especially in view of the fact that you have that reporter's notes that positively—possibly could be identified.

Mr. NEALON.—Well, I thought that the witness should have the opportunity to explain those things on the stand, as a matter of fairness to him.

The COURT.—Well, he is not asking for that.

Mr. NEALON.—Q. Now, Mr. Lewis, can you point out to me where, among the original records, we could obtain the source from which the $1900.00 deposit of December 31, 1927, came? I asked you that question before but you did not answer it.

A. Well, I might as well answer it now. I told you, I believe, that on December 27 there were certain items which were not satisfactorily explained. At that time, I asked Judge Shute regarding them, so that you would have the information. [385]

Q. You mean to say, do you, that, from the original records furnished me, we could not have obtained that information; is that right?

(Testimony of Orme Lewis.)

A. Well, let me see—I will try and think a minute. Well, I will tell you, Mr. Nealon, you could have had that information, because I told you that it was not only from these papers and dead checks, which don't talk very well, but you had an opportunity to prepare this yourself, with the co-operation of Judge Shute and myself, which co-operation was offered time and time again.

Q. Judge Shute had testified already, had he not, about the $1900.00 item and the source from which it came?

A. Yes, he had testified in regard to it and it was quite a while afterwards that he found out where this money came from.

Q. He testified that more than $900.00 of it came from Miss Wentworth, didn't he?

A. I don't recall.

Q. And he testified that $500.00 came from Wesley Goswick, didn't he? A. I don't recall.

Q. And he testified that probably the other $400.00 came from Miss Wentworth, didn't he?

The COURT.—I have read all of that testimony.

A. I don't remember.

Mr. NEALON.—Pardon me, your Honor. I am not asking these questions to delay any proceedings but I thought it was necessary.

The COURT.—I say, I am perfectly familiar and I think I remember that testimony better than the witness does, because I have just read it.

A. I recall testimony in regard to various items. I think it was the examination during May.

(Testimony of Orme Lewis.)

Mr. NEALON.—Q. Now, Mr. Lewis, the information that is in this statement you never gave until the 27th day of December, did you, [386] either to the trustee or to anyone else connected with the case?

A. We furnished to you prior to that time.

Q. You did? A. Yes.

Q. Did you furnish to me information that Wesley Goswick had paid $2,000.00 to Judge Shute on December 31, 1927? A. Yes.

Q. When and where?

A. Judge Shute furnished that to you when he told you about the Goswick transaction.

Q. And that was on November 24, 1927, that he told me anything about the Goswick transaction, wasn't it?

A. Oh, I don't recall the date. I am just telling you.

Q. Nothing was told until, by digging into the records of the bank, we found that this check had been transmitted to Globe for collection?

A. Judge Shute did not know about it until he told you.

Q. He did not know that he had received it?

A. Could not remember it but I don't know why I should testify for Judge Shute.

Q. I don't either. You were not present at the meeting at which Mr. Sylvan Ganz was present, were you, on June 15? Wasn't that the time that you were away and Mr. Robert Armstrong appeared?

(Testimony of Orme Lewis.)

A. Now, wait. I thought I was there at that meeting when Sylvan Ganz was there. Was it the June 15 meeting, Miss Birdsall?

Miss BIRDSALL.—Yes, Mr. Lewis, I think that was the time you were away. Mr. Robert Armstrong appears on the record as appearing.

A. I, for some reason, thought that I was there.

Mr. NEALON.—Q. Now, Mr. Lewis, in regard to your wanting to get these checks in time to make a statement earlier, may I call your attention to the fact that you were away for a while in June?

A. Yes, I was away for—oh, almost three weeks. [387]

Q. And that I left here in August and did not return until about November 5; you know that, do you not? A. Until when, November 5?

Q. November 5.

A. You left the last of August, didn't you?

Q. I think about the 12th. I won't bind you down on that. You knew about the time I left?

A. Yes, I knew that you left town.

Q. You knew that during that period I was not physically able to furnish you with any information, do you not? A. Yes.

Q. Now, let me ask you if these checks were not placed in your hands prior to my leaving here in August?

A. Well, if that is correct, I won't deny it. The checks were not the things in this that held things up. The fact that I did not have the statements to work against the checks was—

(Testimony of Orme Lewis.)

Q. Those were available at the bank, were they not?

A. Well, to be frank, they were available at the bank but we had already—you had already gotten copies of them and we had already gotten copies of them and I did not like to work them any more.

Q. Didn't Mr. Losch of the bank assist you in making up these statements, to some extent, or was that merely furnishing information?

A. He furnished me information from his books. He did not assist me in writing up the statement at all.

Q. You know that during a part of that time Miss Birdsall was away and the young lady in her office was working on making the lists in regard to those checks, do you not?

A. Well, that may be so. I called up one time, I recall, and the girl in the office said that Miss Birdsall had the statements with her and, naturally, she could not give them and then, I think, [388] that it was just a short time after that that you, Miss Birdsall, called me and told me about them.

Miss BIRDSALL.—I just did not want it to appear that we voluntarily delayed you in getting those.

A. It is not so much whether it is voluntary or not. It is beside the point. It is merely the question of not being able to get them for one reason or the other.

TESTIMONY OF THOMAS W. NEALON (THE TRUSTEE), FOR THE BANKRUPT.

(Witness for the Bankrupt.)

(Examination by Mr. MOORE.)

I am the trustee in this bankruptcy case. I filed objections to the application for discharge and, among other ground, I have alleged that the bankrupt has conveyed certain property and concealed other property. One is the lease on his house. One is the Creed note. One is the Noble note. One is the phonograph. One is the Globe house. One is the Essex car.

Q. There is, perhaps, other items. Those are the outstanding ones?

A. At least, all of those are involved.

Q. Have you, as trustee, instituted suit in any court for the purpose of setting aside what you claim to be fraudulent transactions or produce in your possession property which you claim that the bankrupt has withheld?

A. Yes, before the referee, I have asked for a summary order for the Essex car.

Q. Who did you cite on that?

A. Just a minute, please. For the Essex car, for the Noble note, for two other items in there—if you will give me them now— [389]

Q. All of them you know to be claimed by Mrs. Shute and to be in Mrs. Shute's possession, do you not? A. I do not.

(Testimony of Thomas W. Nealon.)

Q. Isn't there testimony in this case to that effect?

A. No, the testimony is to the effect, to illustrate, the Essex car is community property.

Q. That is a conclusion of law.

A. Well, now, wait a moment. If it is, you asked me a question and I want to answer it.

Q. All right. Go to it.

A. All of this community property and, as a conclusion of law, I feel that the statutory agent of the community, Judge Shute, was in possession of that car and that proceeding is upon that theory.

Q. You knew that Judge Shute disputed that issue of law, did you not? A. Yes.

Q. Have you gone to any court to decide that issue of law and to decide whether or not that car is community property or separate property?

A. I have, under the provisions of the bankruptcy law, brought the proper action in the referee's court —proper, as I understand it, to obtain that.

Q. You have instituted no suit in any other court to reduce any of this property to possession?

A. No. May I tell you why I brought that in the referee's court?

Q. No, I am not concerned in that, just so long as you have not instituted suit in any other court. Have you brought any action against any individual in whose possession this property is alleged to be, for the purpose of reducing it to your possession?

A. Please give me that question again in detail as to the [390] properties.

(Testimony of Thomas W. Nealon.)

Q. Well, have you brought any suit against anybody to recover possession of the house in which Judge Shute lives under lease? A. I have not.

Q. Have you brought any suit against the Creeds to recover an amount of money which you claim they owe Judge Shute?

A. No, that note is not due.

Q. Well, have you brought a suit against Joe Noble to recover an amount of money that you claim he owed Judge Shute?

A. I have not. I haven't had the possession of the note. I have been demanding it and the first time it has been produced has been here in this courtroom.

Q. You know that you do not have to have possession of a note to bring a suit. Have you brought a suit against Mrs. Shute to get possession of the notes? A. No.

Q. Have you cited her in the bankruptcy court to produce this Essex car and any of this property that she claims?

A. No. I had her brought into the bankruptcy court and, from the examination there, came to the conclusion that her possession was only colorable—her title was only colorable and, therefore, the referee had jurisdiction of the matter.

Q. Still, you haven't taken a chance to try out that case in the civil court?

A. I am trying it out in the court which has jurisdiction of the matter, unless I am wrong in my conception of the law.

(Testimony of Thomas W. Nealon.)

Q. You have brought no suit against Mrs. Shute? She is not in the bankruptcy court?

A. Possession of the property is in Judge Shute, in my opinion. He has testified that he drove it and she testified that he drove it and that they used it between them as they desired.

Q. Have you brought any suit to settle the title to the property [391] in Globe?

A. No, but I intend to.

The COURT.—Let me understand there, Mr. Nealon. Do you mean to say that where a husband gives to his wife an article or piece of property that it is still in his possession?

A. Not if he was competent was the word I used. I mean, if he was legally competent at the time to make the gift. You know our allegation in that, if your Honor please, that he was insolvent but there is further testimony all through the record that Judge Shute was using that car practically all of the period that the Hudson car was in the possession of the A. E. England Motor Company and at other times and Mrs. Shute's own testimony in there was sufficient to convince me was in the statutory agent of the community.

The COURT.—Do you mean to take the position that under the Arizona Community Property Law that a husband may not give personal property to his wife?

A. When he is insolvent.

The COURT.—Q. Under any condition?

A. No, but when he is insolvent.

(Testimony of Thomas W. Nealon.)

The COURT.—Q. You mean by that he has no power to contract?

A. Oh, no, not to contract but to give.

The COURT.—Q. To make a valid conveyance to his wife?

A. Oh, no.

The COURT.—Q. When he owed debts?

A. Without consideration, yes, that he has no power. I think the case of Lewis vs. Herrera is clear on that point, if your Honor please. That is a case in this state that went to the Supreme Court of the United States.

The COURT.—Q. In other words, if one is insolvent, do you hold to that extent or one who is merely indebted?

A. Oh, no, the man must be insolvent. Here is my theory of the [392] law and, sustained I think by a decision of the United States Supreme Court, under the common law, as well as the decisions in this state and by the terms of our statute on fraudulent conveyances. That is that if he makes a gift or makes a conveyance without consideration, without retaining sufficient property to pay all of his debts, that that is an absolutely void transaction as to creditors.

The COURT.—Q. In a civil proceeding?

A. The bankruptcy statute, I think, specially provides that the trustee may have the benefit of that, even though it is not the creditor interested in the proceeding.

The COURT.—I understand that, but, did that,

(Testimony of Thomas W. Nealon.)

in your judgment, furnish sufficient basis to charge this bankrupt with making a fraudulent conveyance and of perjury?

A. Yes, that is my opinion, if your Honor please. My opinion is that that should have been listed as community property. He might have stated—in other words, I think it was the duty of the bankrupt to have made a frank disclosure of these matters in his schedule. I think that that duty is greater where a man has been on the bench for many years and is charged with knowledge of the law.

The COURT.—Well, everybody is presumed to know the law but you know the Community Property Law has been a source of much discussion, not only among laymen but lawyers and I am trying to get at your reason for charging him with perjury and fraud, in view of that well known situation in Arizona and in California, and, in view of the decision of the Supreme Court of the United States and with reference to joint returns in California and the present case pending here in this court with reference to the right to make joint returns—I don't know the name of it—

A. Koch case?

The COURT.—I don't remember the name of it. What I am [393] interested in is not determining whether there was any mistake by Judge Shute in his construction of the Community Property Law but *but* whether or not he has committed the offenses with which he is charged.

(Testimony of Thomas W. Nealon.)

A. Of course, that is it.

The COURT.—Nor am I interested in knowing whether he correctly or his clerk correctly interpreted the law in making income tax returns.

A. That, if your Honor please, was introduced as an admission against interest, showing that for years they had treated that as community property.

The COURT.—Q. Treated what?

A. The Globe property in this income tax return. That was the main purpose.

The COURT.—Yes, I so understood it.

A. I thought it had great bearing upon that one question but you asked me if I thought that that was sufficient to base a charge of that kind in regard to the Essex car. I do, especially in connection with the testimony that is already in the case, both of Judge Shute and of Mrs. Shute, which testimony I had before this proceeding.

The COURT.—Q. Do you think that when a man gives his wife a car or a phonograph or something of that sort and that the records of the dealer—the fact that he drives it around publicly and apparently he had the right to make those presents to his wife was sufficient to base a charge of fraudulent concealment of property—that particular property, which is not concealed at all, and perjury in connection with that property?

A. I think it has been so held in quite a number of bankruptcy cases, if your Honor please, that where the conveyance has been made to the wife under the guise of a gift—

(Testimony of Thomas W. Nealon.)

The COURT.—No guise about it. It was a plain open gift, was it [394] not?

A. Well, in one sense and purpose, it was. In the other sense, he was charged with knowledge of the law and with knowledge that he could not make that gift.

The COURT.—When a man conveys property to some third person, without consideration, for the purpose of concealing it from his creditors, that is one thing but where there is a dispute as to the construction of the community property statute and a dispute as to the legal right to convey it or on this summary proceeding that you refer to—the question is whether or not the Court is justified in concluding that under those circumstances a bankrupt should be denied his discharge on the ground he has committed perjury or entered into a fraudulent transaction with intent to defraud his creditors. Now, in other words, do you take the position that because he gave his car to his wife or that he gave it to her that that was sufficient grounds to bar his discharge and to stamp the transaction as fraudulent and also to constitute perjury?

A. I think it certainly does, to this extent anyway, that after his attention has been called to it he still makes no effort to bring it into the bankruptcy proceedings. Now, that part, I don't see that there could be a question between anybody.

The COURT.—Well, if a man thinks he has the right to convey a piece of property to his wife or

(Testimony of Thomas W. Nealon.)

give a piece of property to his wife, while he might not have that right and the car might have to be returned in the proper proceeding in court or any summary proceeding, would that be held to be the proper proceeding—is it right to charge such a one with perjury in connection with things of that sort —of actual intentional fraud?

A. If he is charged—he is charged with knowledge of the law. Now, I think that that matter would be a matter of construction.

The COURT.—It might be possibly constructive fraud or legal [395] fraud—I don't mean that—which would justify the return of the property or recovery of the property but the matter we have up now is whether or not there is anything there to show actual, intentional fraud knowingly committed with a corrupt purpose and intent. I merely wanted to get your theory upon which you are proceeding as trustee in a matter of this kind.

A. Well, now, you mean as to these particular items—

The COURT.—As to the specifications of fraud and perjury.

A. In general?

The COURT.—In general and in particular.

A. Well, now, in general and in the—take, for instance the first of them, the Hudson car, there is direct testimony in the record here that Judge Shute placed that car in the hands of this man and states in his testimony that he was expecting litigation.

(Testimony of Thomas W. Nealon.)

The COURT.—I have read that he returned it to Mr. England, because it was not paid for and one who makes a sale of personal property, under the Arizona statutes, though no conditional contract is entered into, the purchaser may enforce a lien—there can be no claim of exemption and the purchaser could have repossessed the car from Judge Shute but, if he elected to return it to him, because he could not pay the balance, was that a fraudulent transaction?

A. One element is left out of your Honor's statement.

The COURT.—What element is that?

A. That is that this car, according to the books of the dealer, had been totally paid for—every dollar of it had been.

The COURT.—No, I don't so understand.

A. Had been paid for long before that time.

The COURT.—I don't so understand.

A. The three items are specific in there.

The COURT.—I don't understand that the last Hudson car had been paid for. [396]

A. The three items, and, if your Honor will look at that account book to the time that he paid $2,000.00 to—that appears in later testimony, I think; that he paid $2,000.00 to England and received back a check for some $764.00. The whole account shows only $14.15. That was a balance anyway and that can be easily ascertained from the account is for other matters than this car. Now, there are three items and connected up with is

(Testimony of Thomas W. Nealon.)

England's testimony and the other testimony, connecting those items up as being in full payment of that car, if your Honor please.

The COURT.—Well, I will hear you on that in the argument but I am merely making these statements so that you might know the matter that is in my mind.

A. I call your attention again, since we are on that particular point, as to Judge Shute's own testimony in the transcript that he had an interest in that car, expected to get it back but did not expect to get it back for the benefit of anybody else—something of that kind. Now, that is based, and I think the record clearly shows it and, besides that, if your Honor please, one week before the bankruptcy or ten days before the bankruptcy, Judge Shute made an oath that he owned that car, when he made that mortgage.

The COURT.—Well, I will hear you on that later.

A. Yes, these questions were directed as to my good faith, I suppose, in the—or rather negligence in not bringing actions.

The COURT.—Well, I understand that.

A. To explain that—

The COURT.—Yes, in connection with that, you are an officer of the court. You are not the representative of a creditor alone.

A. No.

The COURT.—You are trustee. You are an officer of the court and your duty is to gather in, for the benefit of the estate, all property which

properly belongs to the estate and, for instance, you take this life insurance policy, the question is whether or [397] not the life insurance policy has a surrender value and is the property of the estate is, as you know—for many years was a disputed question. I think that matter has been settled in so far as this Ninth Judicial Circuit is concerned that if there is a surrender value and the insured reserved the right to charge the beneficiary, if he knows that he has that right and we know that many people do not know whether they reserve that right or not. They take a policy and they are not concerned with whether they reserve that right to change the beneficiary but it has been a matter of dispute in the courts and among the members of our profession for years and years and it has reached that stage it has caused some of the states to pass a law, notably Michigan, to the effect that life insurance policies and the proceeds thereof are exempt from the payment of the debts of a deceased; not only so, but it includes the surrender value thereof. That is expressly put in the Michigan statute, so that if one goes into bankruptcy that—I said the deceased—I meant to say the insured; that under the Michigan law now that probably is not a part of the bankrupt's estate the surrender value is made exempt, as well as the policy and the proceeds thereof. That is not true in this jurisdiction but such matters have been in dispute among lawyers and there has been decisions throughout the whole country in conflict on that

(Testimony of Thomas W. Nealon.)

question and I remember, when they had it up here, when I was holding court here years ago, the question was threshed out, one set of lawyers contending that it was exempt and others contending that it was a part of the assets of the estate and, therefore, properly inventoried as such and, while all of these matters, it seems to me, can be threshed out in the proper way, whether in a summary proceeding of the court, the referee or in a suit, if that be necessary, what I want you and the attorney for the petitioning creditor to do is to show any active intentional fraud on the part of this bankrupt. [398]

A. Well, if your Honor please, I think I can furnish you with a direct case on this question of the insurance. I think the Supreme Court of the United States has also settled that question as to cash surrender value.

The COURT.—I don't question that. As I say, the Ninth Circuit has passed upon that and the Supreme Court has passed upon that.

A. Just passed upon it here in that Koch case and Judge Jacobs has passed upon it since in another.

The COURT.—I have passed on it here. It is not the question of the legal status of it. It is the question of the bankrupt's knowledge of the status of that and whether or not if he, in saying that it had no known value or cash surrender value—whether he was mistaken in the law but that does not necessarily mean that the statement was wil-

(Testimony of Thomas W. Nealon.)

fully and corruptly false. It may be that, as a matter of fact, it is a part of the estate and he is mistaken in that but that does not mean necessarily that there was any corruption or fraud.

A. Of course, we are getting a little off towards the argument but I would like to get that clear. The courts hold, so far as I have been able to find it, and I didn't make one of these without consultation of authorities, if your Honor please—

The COURT.—I don't question that, Mr. Nealon. I am not questioning whether you are correct in the law or not, and the legal status of the policy and the legal status of the community property but what I am concerned with is, even though the law says it is a part of the estate, whether there is anything in this record to show, even though the bankrupt was mistaken as to the law and was mistaken as to his right to make gifts to his wife, as many people would be under the circumstances, there is anything in there to show any active, intentional fraud. In other words, equivalent to the commission of a criminal offense.

A. I understand that. Now, if your Honor please, my construction [399] of that is, and I think I am sustained by authority in that, that the intent is presumed from the act and, when an insurance policy—a written instrument is introduced and they fail to schedule it, and, especially, that the presumption is that that was fraudulent and I think that is expressly true where the use of the blanks will show—where you might call them—are

(Testimony of Thomas W. Nealon.)

almost fool-proof—where they point out to you and ask you if you have any insurance policies and when the word "None" is inserted in under insurance policy, that should have been disclosed and then the question of law threshed out. If it had been disclosed, there would be nothing.

The COURT.—Perhaps so.

Mr. MOORE.—That was disclosed at the first meeting of creditors, your Honor, voluntarily, by Judge Shute.

A. With the statement that there was no loan value coupled to it.

The COURT.—Well, there might not have been at that time. There might not have been any loan value at that time or the bankrupt had not thought there was any loan value attached to it. There had been previous loans, had there not?

A. No.

The COURT.—No loans at all?

A. No loans at all on the property.

The COURT.—Well, it is rather unusual, if there is any loan value, that the insured does not take advantage of it.

Mr. MOORE.—Pretty good evidence that he did not know that it had any.

The COURT.—I merely wanted you to know what I am interested in and the situation of the case thus far. Of course, I want to hear the balance of the testimony but, while you are a witness, you being the trustee, I wanted to get your idea. I am speaking to you now as a witness and as a

(Testimony of Thomas W. Nealon.)

trustee and I am not speaking to you as a lawyer in the case at all, because, when the argument [400] comes up, then you will make such argument as you think proper.

A. Now, if your Honor please, I would like *to relieved* of any implication of negligence in there.

The COURT.—Well, you may go ahead and answer the question as to the question of negligence. You, as I understand, were proceeding according to what you conceived to be your right under the law?

A. Yes.

The COURT.—If you were, however, mistaken in your remedy, you made a mistake, that is all, but you are not culpably responsible and, if Judge Shute has made a mistake in believing that certain property is community property, the question is whether or not he should have been charged with fraud and crime.

A. I think that is a matter of defense.

The COURT.—Well, no, I think that—

A. We could not prove intent other than by—

The COURT.—You can prove it by circumstances.

The WITNESS.—All right, Mr. Moore.

Mr. MOORE.—Q. Mr. Nealon, hasn't Judge Shute, on many occasions, offered to assist you in every way possible, to come to your office or you come to his and go over the checks and data and records and explain any item and talk it over with

(Testimony of Thomas W. Nealon.)

you and help you in every way he could to arrive at the status of his financial condition?

A. Mr. Moore, in answer to that question, Judge Shute offered to make an explanation as to the checks. I thought that the proper place for that explanation was in the courtroom. Therefore, all of the explanations in regard to this have been asked so that they would be a matter of record in the proceedings.

Q. Now, Judge Nealon, did you think it was fair to call anybody on the witness-stand unexpectedly, not having any idea what he is going to be examined about, and flash a check or an item of a certain amount years old and have him explain it right off the reel? [401]

A. In those cases, Mr. Moore, he had the opportunity of explaining them afterwards, if he had asked time or anything else, yes, but my theory of that was and is now that he should have furnished this information to the trustee in the first instance and not put it up to the trustee to go through examinations of eight months to perform the duty that he is by law upon him.

Q. Well, now, just what have you in mind, Judge Nealon, he did not furnish you?

A. He did not furnish either a statement or a record book of any kind that would show his receipts and disbursements.

Q. Didn't he furnish you all he had?

A. No, he did not. He did not furnish us any information that would show receipts of the money

(Testimony of Thomas W. Nealon.)

from C. C. Julian. He furnished no information in regard to the $2,000.00 check from Wesley Goswick and we obtained that information through a search of the bank records. He did not—

Q. Now, Mr. Nealon—

A. May I finish answering the question? He did not furnish us any information in regard to the $1,000.00 paid before hand by Wesley Goswick, until we obtained the information by asking him to produce his income tax returns and his explanation there does not correspond with the explanation in the courtroom.

Q. Didn't he furnish you a bank statement showing that he had deposited $3400.00 in the bank and did you ask him the source of that in any place except on a sudden, unexpected question on the witness-stand to the source of it? Did you go to his office and say, "Now, Judge Shute, here is an item of $3400.00 appears on your bank account. Now, what is that?" Did you do that?

A. Mr. Moore, I did not and I would not do that in any case. Why should I go to his office and have the matter a matter of dispute between him and me afterwards as to what took place in his office? [402]

Q. Have you proceeded on the theory, from the very beginning, that Judge Shute was a crook in this case, Judge Nealon?

A. No. On the contrary, I accepted his testimony, as given before the referee, as correct but, under what I conceived to be what I should do as trustee, I asked for the documents sustaining that and, when I found them, I found that they did not

(Testimony of Thomas W. Nealon.)

correspond with his testimony before the referee at all in matters that were of recent date. As an illustration, I will say that Judge Shute testified that his income for 1927 from Armstrong, Lewis & Kramer was about $10,000.00. I accepted that as true and did not know anything to the contrary until the statement from the records of Armstrong, Lewis & Kramer was produced, showing that his income from that source for that year was $15,250.00.

Q. Judge Nealon, is it your opinion that any order made by a referee in a summary proceeding in bankruptcy, to which Mrs. Shute is not a party, could effect her title to the Essex car, the home or any of this other property that she claims?

A. Not if she has a title to it.

Q. That is just the point. A. Yes.

Q. You do not intend to have Mrs. Shute's title adjudicated in these summary proceedings?

A. As to the Globe property, she is not included —that is not included in any summary proceeding.

Q. Now, Mrs. Shute is not made a party to any summary proceedings that you have instituted to recover this property? A. No.

Q. Now, under your theory of this case, Mr. Goswick still owes Judge Shute something over $8,000.00, does he not?

A. Approximately that amount, yes.

Q. Now, what steps have you taken to reach that by writ of garnishment or other process against Goswick? [403]

A. The payments under that are not due. I have my own method planned for reaching that. I don't think that I should be required to disclose it in this

(Testimony of Thomas W. Nealon.)

proceeding, because I don't think it affects this proceeding.

Q. Judge Nealon, I am not concerned with what is in your mind. I am trying to find out what you have done. You have done nothing to intercept this money passing from Goswick to Judge Shute, have you, so far? A. No.

Q. Taken no action? A. No.

Q. Although it might be paid at any time and the payments are coming in to Goswick at the rate of $7500.00 a month?

A. It may be all paid now, for all I know, Mr. Moore.

Q. And then your remedy would be lost?

A. Oh, no, not by any means.

Q. Then, I presume it would be by summary remedy before the referee, would it?

A. Not necessarily. There is a remedy in bankruptcy proceedings for that situation, in my opinion, and a more effective remedy than what you suggest.

Q. Now, Judge Nealon, in answer to some of the questions, the Court asked one of the questions in particular in which you stated that Judge Shute had been guilty of perjury. You stated that in his examination before the referee, at the first meeting of the creditors, he stated that his income from the firm during 1927 was about $10,000.00 and that you subsequently ascertained from the statement it was $15,250.00 and, from the discrepancy between what Judge Shute stated on examination and shown by the statement, you came to the conclusion that he

(Testimony of Thomas W. Nealon.)

had wilfully, corruptly and falsely sworn to the first meeting; is that true?

A. I did not give that as my only reason, Mr. Moore. [404]

Q. But that was one of the reasons?

A. That is one of the reasons, yes.

Q. But there was additional reasons why you thought, in this particular, he corruptly swore?

A. Yes.

Q. Now, Judge Nealon, I desire to call your attention to the further statement and, in order that you may have it in your mind, Judge Shute was asked about his income during the preceding years and he says, "I think last year I received somewhere in the neighborhood of $10,000.00. That is about right, I think." That is the statement you have in mind?

A. That is exactly what I have in mind.

Q. Then, the next question following, you asked him, "You have no books available," and Judge Shute answered, "The firm books show my earnings." Did you take that last statement in connection with his first statement?

A. I don't quite understand, Mr. Moore.

Q. Did you take Judge Shute's testimony to the effect that the firm books would show his earnings in connection with his previous testimony that his income during 1927 from the firm was in the neighborhood of $10,000.00 and that he thought that was about right? A. Yes, I did take that.

Q. Wait a minute now. Isn't it a fact that within a few days after this first meeting, at which this testimony was given, Judge Shute furnished

(Testimony of Thomas W. Nealon.)

you with a statement taken from the books of Armstrong, Lewis & Kramer, which showed his earnings about $15,250.00 for 1927?

A. Now, I don't remember the date or how long it was.

Q. But that statement was furnished you voluntarily by Judge Shute at your request, wasn't it?

A. No, I would not say voluntarily. It was furnished after [405] that particular examination to which you have referred to, in which I asked for the amount of his income.

Q. That could not have been furnished before that, because this was the first meeting of the creditors, at which you were appointed, Judge Nealon?

A. No, I think it might have been furnished at the first meeting of creditors.

Q. In other words, he should have anticipated your curiosity?

A. This is not a question of curiosity, Mr. Moore. It is a question of the information which the bankrupt is in duty bound to furnish the trustee.

Q. Did he not furnish you that within a very few days after you were appointed trustee?

A. I don't know that it has yet been furnished, for the reason that I don't know whether Judge Shute has yet disclosed what income he has received prior to bankruptcy. What has been furnished has not been furnished to me except under demands.

Q. Hasn't he volunteered a number of times, both Judge Shute and Mr. Lewis, in open court before the referee, to assist you in furnishing everything within their power?

A. They have offered to explain about the checks.

(Testimony of Thomas W. Nealon.)

Q. Which they furnished to you?

A. A portion of which they furnished me. Some are missing. Not a great quantity—yes, there is a considerable quantity too—are missing, but the checks do not reveal the source of income or the business transactions, nor is there kept any account upon the stub book itself that gives any information in regard thereto and I learned from outside sources of income by Judge Shute, which I have never learned from him by any disclosure either of records of testimony.

Q. Well, I presume, Judge Nealon, you refer to the Goswick transaction. Now, as a matter of fact, didn't Judge Shute come to [406] you and make full disclosure, some time in November, of the Goswick transaction?

A. I would say not. He did on the Saturday before Thanksgiving come to my office and give me the same figures that were testified to by Mr. McBride this morning. He also gave me at that time the information that he had received the $8,000.00 in June, but we had had a meeting on June 15, a few days subsequent to his receipt of that money, according to his testimony, in which the Goswick transaction had been discussed and he had given me no information of that payment.

Q. Well, did you ask him if he had received that payment on June 8?

A. I don't recall now whether I did or not. I had that information at that time.

Q. Well, you already had it, then. It was not necessary for him to disclose it, Judge Nealon?

(Testimony of Thomas W. Nealon.)

A. Yes, I had it. I got it by persistent exploration and examinations the same day that Judge Shute gave me the information.

Q. We are speaking about the examination in June. I asked you if you questioned Judge Shute about $8,000.00 at the examination on the 15th of June?

A. I don't know whether I did on the 15th of June or not.

Q. You just stated—

A. No, I didn't state, now, about that. I said about the Goswick transaction, that is, he had told about the sale—the last payment in June of $82,500.00, without mentioning his receipt of any sum in connection therewith but, in previous examinations, both Miss Birdsall and myself had asked him repeatedly questions as to whether he had received any other large sums of income of money and he said he had not and he was asked if he expected any and he said he did not.

Q. Now, at the examination on the 15th of June, at that time, [407] did you have knowledge of the Goswick transaction?

A. Not a bit of knowledge, other than such information as was in the income tax return and the testimony of Judge Shute that he had received $500.00 as a gift, because of his handling of the previous option on the property and, either at that meeting or at a previous meeting, he testified that he had received $500.00 more from Goswick in connection with the sale of some stuff that was salvaged from the property.

(Testimony of Thomas W. Nealon.)

Q. But, Judge Shute did come to you—that was on November 24, I believe you stated—and give you full information in regard to the Goswick transaction, the amount of money that he had received and just for the purpose of enabling you to trace it down and find the facts in the case, didn't he?

A. May I state it just as it occurred there?

Q. Yes.

A. Judge Shute called me up the morning of the Saturday before Thanksgiving and asked me if I could see him if he would come right away. I had an engagement and I told him that I could not see him then but I would call him up when I would get at leisure and, later in the day, I called him up and he was busy and we made an appointment for 2:00 o'clock. He came at 2:00 o'clock that day and gave me this information about the $20,000.00 and the $50,000.00 and information about the friction between Mr. Packard and Mr. Goswick and, I think, in the course—yes, he stated that he was giving me that information as a guide to me in examining those witnesses. I don't know that he mentioned them by name but I think we understood.

Q. At that particular conversation, did he not make it plain to you that, from his viewpoint, any monies theretofore paid him by Goswick and any monies that Goswick might pay him in the future were voluntary gifts from Goswick to him?

A. In every instance, he stated that they were gifts to him [408] whenever he testified in regard to it.

Q. Now, one of the charges you make against

(Testimony of Thomas W. Nealon.)

Judge Shute is he concealed the affairs of his partnership interest?

A. Is that charged as a specification?

Q. I think it is, Judge Nealon.

A. I don't recall it, that is.

Q. I may be mistaken. A. I think—

Miss BIRDSALL.—Failure to schedule, Mr. Moore. Failure to schedule, only.

Mr. MOORE.—Well, that is what it is. Anyway, it is charged in the specification as failure to schedule his interest in the partnership.

A. Yes, in the first schedule, there was no schedule—no item—nothing showing that he had an interest in the partnership.

Q. Don't you recall, at the first meeting of the creditors, which was the very day that you were appointed the trustee, he produced a copy of the partnership agreement and told you his construction of the old partnership agreement, of which, on a dissolution of the firm for any cause, he did not think he would have any interest left and quite a bit of discussion was had and he said that was a matter of law under construction of this contract? You recall that, do you?

A. Yes, I think that is almost exactly so. He said, in explanation of his testimony, that what he would have under the formal contract—that he was construing a written contract.

Q. One of your grounds of perjury is predicated upon Judge Shute's answer to a question in his first examination, in which he stated that there had been no dividend in April, was it not, and it later on developed, from the statement he furnished you, that

(Testimony of Thomas W. Nealon.)
there had been a dividend of about $725.00 on the 10th of April? [409]

A. I think that is correct.

Q. In making that charge, Judge Nealon, did you take into consideration Judge Shute's testimony at the same hearing, found on page 16 of the transcript of testimony taken at that meeting, where the following question was asked him: "Have you received any dividends since this was made?" Referring to the loan that was made at the National Bank of Arizona on the 7th of April, I believe. And, Judge Shute says, "No, I cannot tell whether the last dividend was on February 28 or April 2 but it was one or the other." Did you take that into consideration? A. I think probably I did.

Q. And, then, as I understand it, your predication of the perjury charge is based on the fact that on the 1st of May he testified in one place that there was no dividend in April and the next place he testified that there was a dividend, probably, on the 2d of April, he did not know which, the last case having been off seven days in his date? Do you think that is a serious, wilful perjury?

A. Mr. Moore, I think when you consider his testimony as a whole and on that date, it does show a very serious intent to deceive the trustee and the Court as in regard to the income. I think you will find other testimony in there that shows that. We were trying at that time to get an explanation of what became of the money that he had received from the First National Bank as a loan and these questions were very pertinent at that time.

(Testimony of Thomas W. Nealon.)

Q. Although he did furnish you a statement in a few days showing the exact amount?

A. You say a few days, Mr. Moore. I don't know that it was a few days. How long a time it was, I can't now say. I think the statement was furnished by Mr. Lewis. Perhaps he could give the accurate date.

Mr. LEWIS.—Why, one day, if you will excuse me—one day, in [410] the trustee's office you asked—I mean in the referee's office, you asked for a copy of that, because you did not happen to have one, and I notice, in looking through here, I gave you the copy on which was marked the date of delivery to you, so very likely it was among your papers. A. What date was that?

Mr. LEWIS.—I could not remember. It was quite a while ago. I had two copies and, unfortunately, I picked up the one and handed it to you that had the date of delivery marked, so very likely you have it among your papers.

A. Well, I introduced the copy that I have into evidence. There has been such a mass of papers, it may be that it is—

Mr. MOORE.—Q. Now, Judge Nealon, in regard to the life insurance policy, you predicate charges of both perjury and concealing property on that?

A. Yes.

Q. Did you take into consideration, in making that charge, that, at the first meeting of the creditors on May 1, Judge Shute, without being questioned at all in regard to his life insurance policy, said, "I would like to mention my insurance policy, just an ordinary life policy, and has no loan value

(Testimony of Thomas W. Nealon.)

whatever, so I did not list it," and you asked him, "Is it an old line company?" "Yes." "Is it a term policy?" And Judge Shute replied, "It is what is called an ordinary life." And you asked him, "Have you ever borrowed any money on it," and he stated it had no loan value. Did you take that statement into consideration in connection with the fact that at the next meeting of creditors Judge Shute produced the policy and exhibited it to you?

A. Yes. I also took it in connection with the fact that in his schedule he had reported, in the blank provided for that purpose as to insurance, none; that he coupled wtih his statement that he had the policy and that it had no loan value. If I had accepted [411] Judge Shute's statement without further investigation, I would never have ascertained the fact that he had a policy that did have a loan or cash surrender value.

Q. As I understand it—

A. I coupled it with the fact also that he did not list that policy, I think, in his second schedule. That is my recollection of it now. And with the further fact, if I recall correctly, that there is a loan value expressed in the policy.

Q. And you did not think the fact that he had not exercised that loan value, in view of his evident financial distress, was of no bearing?

A. I could not say that there was any evidence of financial distress at that time; rather, a filing of a schedule showing assets in a sum of about $290.00, when there were considerably more assets in his possession.

(Testimony of Thomas W. Nealon.)

Q. Well, then, Judge Nealon, do I understand you to think that every man who does not agree with you—your own construction of law or contract or title is a perjurer and a crook?

A. Certainly not.

Q. Well, isn't that the basis on which you predicate your charges of concealing, it is a difference of opinion in regard to the law or the title or rights?

A. No, I think not. Now, Mr. Moore, I predicated that charge upon investigation of cases.

Q. That is a question of law, isn't it?

A. Pardon me. Where the language of the court held specifically that the concealment of a policy with such a value was grounds for opposition to the discharge.

Q. Undoubtedly that is the—

A. And I ground it further on this, Judge Shute had before him the written contract and the examination of that contract itself would have disclosed to him that fact that that did have this value. [412] My recollection also is that at that meeting a statement was made in regard to the fact that such policies were an asset of the estate.

Q. You did not resolve any question of doubt at any time or give Judge Shute credit for honest intentions and good faith in any period of this proceeding, have you, Judge Nealon?

A. Yes. As I said this morning, I accepted, when I went in there, the statement of Judge Shute at the first meeting of creditors as being an absolutely true statement of the facts. When the record of

(Testimony of Thomas W. Nealon.)

his earnings with Armstrong, Lewis & Kramer showed such a wide discrepancy between his testimony and, when I considered that the date of his check for his income tax return—I could not figure it conceivable that he could have forgotten that difference in the length of time between that examination and the time of filing his income tax return or even the time of the calculation of his earnings in Armstrong, Lewis & Kramer, nor can I yet.

Q. Judge Nealon, you heard Mr. La Prade testify this morning in regard to the Cornelius transaction? A. Yes.

Q. His testimony was substantially the same as that given by Judge Shute on his examination, was it not?

A. No, and yet I don't know that the difference in it would be material as to this proposition. I will point out the difference, if you wish me to.

Q. Did you ever interview Arthur La Prade to verify Judge Shute's testimony in regard to that transaction?

A. No. I think his subsequent statements and actions were sufficient basis for the charge. You will recall, Mr. Moore, that Mr. La Prade testified this morning that he did not know whether the money that Judge Shute paid him had ever been paid over to this man. Now, I thought that if Judge Shute had gotten in this [413] money—had paid out this money, he would have some knowledge of some kind of it which should have been listed and then it was for the trustee to examine

(Testimony of Thomas W. Nealon.)

whether it was an asset or not of the estate or whether a thing to be rejected as worthless.

Q. According to your construction of law, if a bankrupt fails to list something that is absolutely worthless as an asset, is he guilty of perjury in concealing assets? A. Now, that is argumentative.

Q. I just want to get your viewpoint.

A. No, that is not my viewpoint. My viewpoint as to this particular transaction was that there was an asset of the estate and, as that has been paid over by Judge Shute since that time to me as trustee, I take that as an acknowledgment that there was such an asset of the estate.

Q. Now, as I take it, Judge Nealon, you are not at all biased or prejudiced against Judge Shute in this matter?

A. No. I would be glad to see him clear of the whole thing. I have no feeling in the matter whatsoever.

Q. No, I would so judge but, Judge Nealon, Judge Shute turned over to you that—When any controversy came up as to whether or not it was an asset of the estate or own private property, didn't he turn it over to you and—Take that check of $250.00?

A. Yes, my recollection is that he turned over the original check, when the point was made, and he said he would not argue about it or something of that kind—same statement.

Q. And, evidently turned it over to you very

(Testimony of Thomas W. Nealon.)

quickly after he received it from La Prade and that he turned over La Prade's original check, didn't he?

A. I don't know about that, Mr. Moore.

Q. Now, let's look it over.

A. I was wondering this morning as to what time that was done.

Q. Now, let's pursue that a little further. Isn't it a fact [414] that, when Judge Shute turned over to you that check from Arthur La Prade, he told you that he did not think that, under any theory of the law, you were entitled to it but it was a voluntary payment by La Prade, without any obligations, but, in order that it might be settled without controversy, he would give you the check, the $250.00, and you asked about the phonograph and you stated that you would be glad to do the best you could for him along that line?

A. Let me explain that, will you, please. It is not quite as you—

Q. Yes.

A. I would have been glad to forget about the phonograph and Judge Shute did discuss a payment of two or three items in there and I think practically requested me to forget about the contract. He afterwards sent me a letter with the check, in which—that is my recollection of it—with the check, in which he said that it was in settlement of these amounts so as itemized. I sent the check back and stated to him that I had no authority to do that but that I woud present the matter of the phonograph and I did.

(Testimony of Thomas W. Nealon.)

Q. And the—

A. No, pardon me. I did not tell the whole story. Judge Shute and Mr. Lewis came to my office afterwards with the check and said that they paid it to me without any conditions but, I think, made the same remark that they would—

Q. In other words, they were rather depending on a gentleman's agreement, were they not, Judge Nealon?

A. No. There was a limitation to my authority and it was paid over without any conditions, with the understanding that I would report the case to the creditor that was interested and the Court and see whether they would consent to the phonograph being dropped from the proceedings.

Q. I don't imagine the creditor was any more prejudiced against Judge Shute in this case than you are, is he? [415]

A. I don't know anything about that. They have had friction. They were former friends, as I understand.

Q. There wasn't much chance to accomplish anything. That is all, Judge Nealon.

Cross-examination by Mr. DYER.

I am familiar with Specification A First, objection to the discharge of the bankrupt in regard to the Hudson car. I felt in making that specification that I was justified in so doing and I was actuated in making that specification by the testimony at the hearings which showed that the condi-

(Testimony of Thomas W. Nealon.)

tional sales contract had been recorded against this; that subsequently a mortgage to the First National Bank had been recorded as against it; that Judge Shute had delivered the car to the A. E. England Motor Company, testifying first that he had turned it over; that in that testimony he had spoken of anticipating litigation; that subsequently he had stated that he expected to get the car back and that there was about a thousand dollars due on it and the books of the A. E. England Motor Company being produced in evidence and showing that the car had been paid for entirely either on the day that the instrument was recorded or the day following, the payments being made in three payments; that there was nothing due to the A. E. England Motor Company by Judge Shute, other than a balance of fourteen dollars and some odd cents; Judge Shute's testimony that he did work for him besides and the fact that Judge Shute had refused to give me an order on England for the car; that instead of driving it as he usually did, he testified that he was driving Mrs. Shute's car, as he called it; the Essex car and the further testimony that at the time that he refused to give me an order on England for the car he stated that he would pay me the blue book value for it, regardless of the encumbrances, and that he [416] actually thereafter bought the trustee's interest in the car under trustee's bill of sale for the sum of $900.00, and the testimony of A. E. England given on the stand that Judge Shute had placed it in his business place

(Testimony of Thomas W. Nealon.)

and given, also, the testimony in a very hesitating manner, in which he stated about half of the work "litigation," as Judge Shute was expecting litigation or trouble or something of that nature. There were probably other matters in the record itself that influenced me in that, together with the fact that this car was not listed in the bankrupt's schedules—I am speaking, now, of the first schedule—nor was the debt to the First National Bank listed as a secured debt, which if it was listed, should have shown the fact that Judge Shute had such a car. Those facts, I figured, constituted clear evidence of a concealment of an asset of the estate from the trustee.

I have not as trustee of the bankrupt, the insurance policy. That was returned to Judge Shute, in order to procure a loan and avail himself of his rights under the policy. He produced it in court and it was delivered to him this afternoon and I have asked Mr. Moore if he would send for it.

Mr. DYER.—I want to show the policy itself, your Honor.

The COURT.—I have examined it.

Mr. DYER.—I did not see the policy personally but, on the second page, it has set out there loan values and cash surrender values.

The COURT.—I don't suppose there is any question about that.

Mr. MOORE.—No, we admit that, in big box-car letters.

(Testimony of Thomas W. Nealon.)

Mr. DYER.—So that there could be no question of legal interpretation. It spoke for itself.

The COURT.—You gentlemen agreed that it might be returned, upon the reading into the record of a certain paragraph of it.

Mr. DYER.—Well, personally, I did not know.

Q. I believe you stated that that was based on the fact that in the original [417] schedule, under the head of insurance policies, he stated "none" —written out?

A. Yes. That, in connection with his testimony that it had no loan value. In fact, when I asked Judge Shute to produce the policy, at that time, I supposed I would find that it was a term policy and had no value but I thought I should examine it.

Q. Now, in reference to the Specification First C, state whether or not—

Mr. MOORE.—Now, your Honor, we object to trying this case in a roundabout way here through a prejudiced witness or through any witness at all except the record in this case—direct testimony. We are proceeding in a roundabout way asking this witness why he filed this and why he filed that and right on down the line, trying to establish each one by indirect testimony. Now, the savings bank account, Judge Nealon knows nothing of that, except what he heard; that there was a savings bank account and it was concealed. The records prove that and that is the way to prove that. It is not a proper method of proving charges. Their case has been rested and they quit.

Mr. DYER.—Well, it is a most peculiar situation that a party can call a witness and examine him and ask the character of questions that he has asked Mr. Nealon, some of which had a peculiar personal tendency and a reflection and that if he believed these things constituted perjury and a false oath. Now, I have a right to go in on cross-examination.

The COURT.—You are not cross-examining. You are purposing to prove the charges—to prove that he had reasons for making the charges against him.

Mr. DYER.—I am asking him to justify it. They brought this all out on direct examination—why was he justified and what made him do it. I am going into it further myself to show further why he did it. [418]

The COURT.—I sustain the objection.

Mr. DYER.—Your Honor, I wish to ask the same question as regards each specification.

The COURT.—That is the reason I sustained the objection. I anticipated that.

Mr. DYER.—But I want the exception.

The COURT.—As not proper cross-examination and as not tending to prove any issue in the case but merely the reasons of the witness for filing each particular charge and the basis of such charge. If you are entitled to prove that at all, it should have been in your case in chief and it is not cross-examination of the witness.

Mr. DYER.—I think it will be but we wish to except and let the exception stand to the same ques-

(Testimony of Thomas W. Nealon.)

tions which would be asked in reference to all of the objections, your Honor.

The COURT.—It may be extended through all the specifications. It may be noted on behalf of the trustee also. That is merely a summing up of the case and it may properly be made during the argument.

A. The only thing—I was asked, as an officer of the court and the trustee, did I consider myself justified in those—

The COURT.—Yes.

A. And I thought I had the right and the grounds of the justification on which they were based. That was my theory of that. I may be entirely wrong.

Mr. DYER.—Q. Isn't it a fact that the policy was not produced until the meeting of June 15?

A. I cannot tell you that, Mr. Dyer. I think it appears in the testimony—in the transcript of testimony before the referee but I cannot tell which meeting it was produced at.

The COURT.—That was at the first meeting, wasn't it, Mr. Nealon?

A. No, sir, it was not produced— [419]

Mr. MOORE.—Policy produced at the meeting on the 29th.

The COURT.—29th of May?

Mr. MOORE.—29th of May. The second time the witness was on the stand.

Miss BIRDSALL.—No. If you say so—I thought it was on the 14th.

(Testimony of Thomas W. Nealon.)

A. It was produced at a subsequent meeting after I had called for it.

The COURT.—I know, but it was mentioned by the bankrupt.

A. At the first meeting, yes.

The COURT.—At the first meeting.

A. And that was without any direct question to him upon the subject at all.

The COURT.—Instead of using the word "produced," I meant to say it was mentioned at the first meeting by the bankrupt.

A. Yes.

Mr. DYER.—That will be all. [420]

TESTIMONY OF GEORGE W. SHUTE, THE BANKRUPT.

(Witness in His Own Behalf.)

Direct Examination by Mr. MOORE.

I am George W. Shute, the bankrupt in this case; I was born in Tempe, Arizona; I grew up in Globe and vicinity, in Gila County. Until I was twenty-two I spent my early days on cattle ranches; when I was twenty-two a change came about in my career; I went to school and was finally admitted to the bar in 1902,—I believe it was,—along there; practiced from 1902 until 1906. I may be off a year or so on the years, but that is about right. Went to Northwestern in Chicago from 1906 or 1907 to 1908, and was there a year. Went back to Globe and went into the practice of law and practiced until 1909, when I assumed the duties of what was then the district attorney's office of that county and served

(Testimony of George W. Shute.)

there until 1912. Was elected to the Superior Court Bench about that time and served from then until the end of 1922, I believe it was. Since 1922, I have been engaged in the practice of law with Armstrong, Lewis & Kramer of this city, first as an employee, for the first year, and as a partner of the firm in the subsequent years. I am at this time a partner in the firm of Armstrong, Lewis & Kramer and actually engaged in my profession at Phoenix.

Mr. MOORE.—May it please the Court, we are skipping the first assignment here, in the hopes we may have Mr. England here to take it up in order. That is A under first.

Q. Judge Shute, I call your attention to the objections to your discharge in this matter, which has been filed by [421] the trustee and by the referee, and particularly to Paragraph B of the first specification, which is predicated upon the alleged concealing—alleged commission by you of an offense punishable by imprisonment under the Bankruptcy Act and that you knowingly and fraudulently concealed from the trustee one life insurance policy having a cash surrender value of $746.85. I will ask you whether or not, at your first examination at the first meeting of the creditors, on the 1st day of May, 1928, you did not voluntarily inform the trustee of the existence of that policy and at the same time stated that it had no loan value.

A. I did.

Q. And later on, was it discovered that the policy did have a loan value. A. Yes.

Q. When was that discovery made, Judge Shute? Well, in order to shorten this thing up, that was

(Testimony of George W. Shute.)

made at your second examination, which was on the 29th day of May, 1928?

A. I am not exactly clear as to just when it was, but it was when the policy was produced and tendered to Judge Nealon.

Q. Will you state the circumstances under which you obtained that insurance? Just relate your story to the Court, in order that he may judge of your good faith in making that statement.

A. Well, the policy was written by Grace Crockett—I believe it is Grace Crockett—I am not sure about her first name,—Miss Crockett, however, and was a policy which I had taken out for the purpose of protection only. At the time it was written and during subsequent years after it was written, I had discussed it with Miss Crockett on one or two occasions and probably more, in which I was always told [422] by Miss Crockett that there was no loan value to it, and that it ought to be changed and that it was lacking in certain other provisions of protection that she thought I ought to include in another policy.

Q. You are speaking now about the first policy?

A. About the first policy. I made no change in it until I came down here about the date that appears on this policy, which I don't remember, but in 1924—I will say along about that time—Miss Crockett came into the office on a friendly visit and again took up the question of changing the policy which she had originally written. She discussed two features or two features only that appealed to me. The first was that the premium under the old policy increased with age and told me that by the time I would need

(Testimony of George W. Shute.)

the insurance or the protection that it would come—that the premium would be so large that in all probability I could not meet it. The second referred to a double indemnity clause, which was worded in that—changed my idea about it, which provided for double indemnity in case of accident or other injury expressed or explained in the policy. We did not discuss the loan value at that time, and, later, Miss Crockett rewrote the policy and sent it to me and I put it in my box and, so far as I know, except for just looking at it when it came, I never again examined that policy or its terms. It lay in the box at the office from that time on down until I sent it or took it to Mr. Nealon. I don't believe it had even been out of the folder; if it had been I don't remember.

Q. Judge Shute, do you remember discussing that policy with Mr. Lewis, your attorney, at the time your schedule was prepared? A. Yes. [423]

Q. State what conversation occurred between you.

A. We talked about the policy. I told Mr. Lewis that I did have a policy but that it had no loan value and, having no loan value, would not be an asset. Did not take the trouble to go into the safe and take it out, so thoroughly impressed was I that there was no loan value to it.

Q. Judge Shute, had you ever at any time read the policy?

A. I don't believe that I ever did. In fact I know I had never read it.

Q. What did you do when you found the policy really had a cash surrender value of $746.85?

A. Why I did the only thing that I could do;

(Testimony of George W. Shute.)

made arrangements to protect the policy and got the loan value of it and turned it over to the trustee.

Q. Well, the next specification under ground first is a commission of an offense punishable by imprisonment under the Bankruptcy Law, in that you concealed from your trustee a savings account in the National Bank of Arizona, in which there was a considerable sum of money, eleven hundred,— no, it must have been $3687.50.

A. I think that is the top amount, Mr. Moore.

Q. Just a minute. I will check it up. Yes, that —from which had been previously withdrawn the amount of the Creed and Noble notes, which will hereafter be mentioned. Will you state the circumstances and conditions under which that account was opened in Mrs. Shute's name,—the purpose and reason for it?

A. Yes. That will involve quite a story.

Q. Well, just take your time, Judge Shute, and tell it in your own way, fully and completely. [424]

A. During the time that I was on the bench in Gila County it was always sort of a losing thing. In other words, every year I found I was a little further behind, a little bit further behind, getting in a little deeper and using every dollar that I could and taking from Peter to pay Paul during the years, particularly after Virginia got to the point,— that is my daughter—got to the point where it became necessary to put her in an institution of training of some sort. In 1916, I think it was, some property was sold in Prescott that belonged to Mrs. Shute. The money that was received from that property, neither she nor I have been able to

(Testimony of George W. Shute.)

determine the exact amount. The best of our recollection is that the two pieces of property brought an aggregate of $4500.00, $3,000 for what we call the Gurley and Mt. Vernon property, and $1500.00 for what we call the Grandmother property, which is Mrs. Shute's grandmother. This money, when it came in, I used. For what purpose, I am not at this time clear. Probably used it in the payment of some of these demands—the pressing demands that were upon me at that time, but, in any event, Mrs. Shute never got anything out of it, with the result she was never very well satisfied with that condition and constantly referred to it as *as* instance of where I might have turned over money to her and she would have been able to have saved it. No opportunity arrived, however, that I can recall where there was an instance where we had anything that we might return to her or give to her this amount of money that had come in from this Prescott property until after I came with the firm of Armstrong, Lewis & Kramer. As soon as a situation developed whereby it became apparent that something could be saved, she insisted upon having the return of this money to her, so that she might have it. [425] There were many discussions about it. Much was said about it during these years and she finally started the savings account with money that she had received, probably from me and from other sources that came in to her, of a thousand or eleven hundred dollars.

Q. That is the beginning of the savings account?

A. That is the beginning of the savings account, and, to this savings account was added from time to

(Testimony of George W. Shute.)

time sums of money that I was able to put in or give to her to enable her to put in, including rent from the Globe property. That is the savings account and that is the story of the savings account.

Q. Now, as I understand it, about the 4th of January, there was in that account some $3,687.00 approximately—4th of January, 1928. That is before any withdrawal for Noble or Creed, is that correct?

A. Whatever the amount was, Mr. Moore. I would not attempt to say what the amount was.

Q. Now, Judge Shute, an arrangement was made by which you had the right to draw on that account by the production of a check-book, did you not?

A. Yes.

Q. I mean by the production of the bank-book. Will you state the purpose of that?

A. I don't believe the presentation of the bank-book was a condition of that right. In other words, I know that I did draw $50 or $100, whichever it was. Whatever, it will show that I did not have the bank-book. The reason for making it in the joint account was so that either of us could draw it out in the case of an emergency and for no other purpose. Mrs. Shute did not know of my drawing the first amount, whatever, it was, from the bank, [426] on account of my not having the book at that time for it to be put in. I drew out further another amount—a second drawing, I think, of the same amount to replace an overdraft at my own bank and that time she found it out and objected to it, of course.

(Testimony of George W. Shute.)

Q. Found it out when the balanced book was returned?

A. And told me that if I ever repeated the operation she would go right down to the bank and cancel entirely the right I had to check upon the savings account.

Q. Judge Shute, as I understand it, then you at various times deposited to this savings account portions of your earnings from different sources, and, with the exception of perhaps the rent from the Globe house, the money deposited in that savings account to Mrs. Shute was originally money earned by you.

A. No, not all of it. I think there was some of it that came in from little sales of certain personal property that you might—I think was community, —for instance the piano was sold. She sold a piano we had in Globe that we could not move and there were other little things like some blocks of stock,—two or three kinds in small amounts of a hundred, or hundred and fifty dollars or something like that but, exclusive of those amounts, the amounts that went into that savings account were as I tell you.

Q. What was your purpose in not listing in your schedule filed at the time of bankruptcy money in this savings account?

A. That is quite apparent. For the express purpose as I was returning her the money that came in from this Prescott property and of establishing an account exclusively for Mrs. Shute, to enable her to begin a savings that she had not been able to persuade me to do. [427]

(Testimony of George W. Shute.)

Q. Well, Judge Shute you do not answer my question. Why did you not list as among your assets this savings account?

A. It was Mrs. Shute's separate account—separate estate—separate money, and so regarded it.

Q. Did you consider you were repaying her on account of money that she had advanced you from the proceeds of the Prescott property?

A. Certainly. I told Judge Nealon about it at the time—went into it fully and explained it just as I have now, as near as I can remember, in detail, and to Miss Birdsall, who represents this creditor, as well. How there could have been any concealment of it is beyond me, because it was fully and completely discussed.

Q. Well, also in that connection,—I will take that up, because there is a charge in here that you failed to list a note of Joe Noble of $1235.00. Did you hear Mr. Noble testify on the stand this morning in regard to that particular transaction?

A. Yes.

Q. Tell the circumstances under which that transaction was made—all of the facts in connection with it.

A. Joe Noble had been a pupil at the Tempe Teachers College, then the State Normal School, where I first became acquainted with him, and where she was a teacher and he a pupil. She was quite interested in him even at that time. The friendship which began along about 1900 or 1901 kept on until—he visited our house frequently between 1901 and 1917; was always welcome and was thought much of in our household. In 1917 he was

(Testimony of George W. Shute.)

a captain of an infantry troup that was stationed at the Dam. He, during that time, in Globe, used to almost make our house his own house. [428] He would come there and stay and was perfectly at home there, and the very best of relation existed between us, and the very best of feeling existed between us. When this incident happened, Joe Noble came into the office one morning about the time that I arrived at the office in a very blue, despondent state of mind. He explained to me that he had gotten into some trouble and had to have $1200 and had to have it immediately. I talked to him about it quite a little bit and told him that I had no money; told him about the savings account of Mrs. Shute and told him that he might be able to talk her into it in the situation and to protest, whereby she would feel that she would not lose the money entirely. He asked me where Mrs. Shute was, and I told him she was uptown shopping, and that he would probably find her at Goldwater's, as she had told me she was going there for the purpose of purchasing some articles. He left the office, was gone some little time and came back with Mrs. Shute to the office. Mrs. Shute sat down and said that Joe had been talking to her and wanted to know what I thought about it. "Well, I think that is a matter entirely for your consideration." We talked to Joe about his ability to return the money and he told us that he would get a fellow by the name of Price, he thought, to sign the note, so that it would be payable directly to Mrs. Shute and that instead of getting the 4% which was hers upon the

(Testimony of George W. Shute.)

savings account that he would pay her 8% on the amount. I took the matter up with Kramer, and asked Kramer what he thought about it and Kramer immediately suggested that instead of Mrs. Shute letting the money come direct, that the bank lend it to Joe and secure this signature of Price and that in all [429] probability he would be much more apt to return it than if he had made the note directly to Mrs. Shute. The matter was subsequently taken up with Mr. Washburn, who corroborated that, and Mr. Washburn made the arrangement whereby there would be set apart from Mrs. Shute's savings account a sufficient amount of money to keep this note liquid. Joe said he would get Mr. Price to *t*ign this note,—I think that is the name—and that he would pay $50 a month on it. That sounded to me to be a better proposition than the one which I had talked over with him in the office, and that was finally done. I endorsed the note and a certain portion of Mrs. Shute's savings account was set aside in case it should not be paid to keep it liquid and the matter ran along, and Joe did not secure the signature of Price. Whether he could not or did not, I don't know, but he never paid the note, until finally Mr. Washburn told me that he thought it ought to be gotten out of the way; there was no need of fooling with it, as he expressed it, and that he would take it out of the savings account and deliver the note to me, which he did, and I, in turn, turned it over to Mrs. Shute. When this matter came up before the referee, I told Mr. Nealon and Miss Birdsall that the note was worthless; that I considered it worthless, and that I would deliver it

(Testimony of George W. Shute.)

to Mr. Nealon. I thought at that time that I had the note in my possession. When I went to look for it I found that I did not have it; that she had the note, and consequently, I delayed the delivering of the note to Mr. Nealon—did not deliver the note, and finally an order was made requiring me to deliver the note, and then I refused to deliver it, upon the ground that it belonged to Mrs. Shute.

Q. In this connection, there is also a specification against your discharge, alleging that you have concealed fraudulently a $1500.00 note executed by Leslie W. Creed and paid [430] from the savings account—money of which was not paid but the money advanced from the savings account. Will you explain that transaction?

A. Leslie Creed is my son-in-law. He is Virginia's husband. They live over at Gilbert. I had nothing whatever to do with that transaction, except to fix a note for Mrs. Shute so that they could sign it. Leslie, that is Mr. Creed, had in mind buying a little grocery store that lay out just beyond Gilbert. He could have bought the whole store, if he had wanted, for $1500.00. Leslie and Virginia went to Mrs. Shute and talked her into letting them have the $1500.00 for the purpose of purchasing that little grocery store. She finally let them have the money, took this note, bearing, I think, if I remember the terms of it rightly, 6% interest, and Leslie has paid the 6% interest upon the note and Mrs. Shute, in turn, has either turned it indirectly back to Virginia, or has put it in a little savings account of her little son.

(Testimony of George W. Shute.)

Q. What did they ultimately do with the money, Judge Shute?

A. They bought the half interest in the—I did not finish that deal. The purpose for which the money was borrowed involved a store that was owned by a fellow by the name of Leseur. Lesueur was to deliver Leslie a title to the goods and things of that sort, and Leslie, or Mr. Creed, asked me about it and I explained to him that there ought to be a notice given, so that if there was any creditors against the store they could make their objections to the transfer and Lesueur finally gave some sort of a notice but it was not enough and later got up and left the place entirely and there was an involuntary petition in bankruptcy filed against Lesueur and Leslie left it, upon my advice, and had nothing further to do with it, and did not complete [431] the transaction that he had had with Lesueur. He and his father later, hard on the heels of this transaction, purchased the Bayless store in Gilbert, Leslie, as I understand it, paying $1500 for half and Mr. Creed, his father, paying $1500.00 for an additional half, although that is just my understanding of it. I have never seen any papers or anything of that sort involving the transaction between Leslie and his father. They still are operating that store.

Q. State your reason, Judge Shute, for not listing the Noble note and the Creed note in your schedule as assets?

(Testimony of George W. Shute.)

A. For the same reason; that they did not belong to me; they were Mrs. Shute's separate estate and belonged to her.

Q. Now, the next paragraph, under specification first, alleges the knowing and fraudulent concealment from trustee of a certain contract entered into between him and Wesley Goswick on or about the 8th day of December, 1926, under the terms of which it was alleged you were to be paid $20,000 and have, in fact, been paid large sums of money. Will you be good enough to explain that transaction in detail, Judge Shute?

A. Yes. There never was such a contract, I hardly know how to begin.

Q. Well, begin at the very—that is true. Was there ever a contract between you and Wesley Goswick by which you were to receive 10% commission for the sale of this property?

A. Yes, there was.

Q. Now, start with that.

A. Will you give me the date? Can you give the date of that first option to Stalker and to Mr. Bedford?

Q. I don't know.

A. Well, I can begin a little bit before that. [432]

Q. That must have been in '24, Judge Shute—1925, some time.

A. Goswick is a man that I have been on the most intimate terms with ever since 1910 and knew him for a considerable period of time before 1910.

(Testimony of George W. Shute.)

I have grubstaked him. I have put up money for him to work. I have loaned him money. I have done everything for him that one friend could do for another. He located some cinnabar property—I think it was in 1924—on what is called Slate Creek in Gila County, consisting of what he calls the Ord Group of twenty claims. At the time he located these claims he asked me if I would not go in with him upon the claims and I told him that I was not able to bear the financial burden of it and would not handicap him in any way and would rather that I did not take any interest in the location of the claims or of putting up any money. He located the claims, as he tells me, in his own name, —discovered the claims in his own name and later, after some conversation which I had had with a fellow by the name of Bedford, who was chief engineer of Stalker, who represented some eastern people from Ohio, I think, he told me to try and dispose of these claims in a satisfactory manner to Mr. Stalker and his associated, through Mr. Bedford. Mr. Bedford lived at that time in Phoenix, and was living somewhere just east of Willetta,—he was living on Welletta Streets in Phoenix. He came to the house a time or two, talked about the property and told me that they had been operating a property on the opposite side of the mountain from this property, which was almost inaccessible, and that the expense, incidentally, of putting a road to it and of developing it was almost prohibitive.

(Testimony of George W. Shute.)

He told me that he thought much of what he had seen of these Goswick locations. The sum and substance of all this conversation [433] was that finally Bedford and myself entered into an agreement for the sale of these claims, under the terms of which agreement they were to be transferred to Stalker and his associated by an option to buy, giving as an ultimate payment $100,000.00, as I remember the option, and calling for an initial payment of $5,000.00 and, in addition to that, payments at periodic times during the life of the option. In addition to that, Bedford agreed, and it was inserted in the option, that certain work should be done promptly, a road running from the main highway up Tonto Creek to the claims, a distance of some six or seven miles. In the option was a paragraph which provided that in case it was not exercised for any purpose, all of the property which had been placed upon the property under the terms of the option should be forfeited and should accrue to the benefit of Goswick. It was finally done. It was finally entered into. Mr. Stalker came to see me and said that the agreement was all right and it was signed.

Q. Now, Judge Shute, prior to that time, had you had any agreement with Goswick as to your compensation in the event of a procuring of such a contract for him?

A. Yes, he told me that if I managed to put it across that he would pay me 10% of the payments

(Testimony of George W. Shute.)

that came in under the terms of the option as a commission upon the sale of the property.

Q. Well, proceed, now, and tell what the Stalker people did under that option.

A. The Stalker people entered upon these claims and the first thing they did was to begin the construction of this road. They constructed a road to the property at the expense of a considerable amount of money, the true amount of which I don't know, but may be somewhere between [434] twenty-five and thirty-five thousand dollars. The road was an exclusive road and was used only at that time for the purpose of reaching this property. In addition to that, they began the development of the claims, cross-cutting, sinking, stoping and doing those things that were necessary to be done to properly develop the bodies of ore. In addition to that, they erected a considerable number of cottages upon the property, the number of which I don't know, but must have been, one, two, three, four or five or six individual, including a warehouse, and began the installation of rather expensive machinery upon the property. In addition to that, they put on a considerable amount of materials, consisting of lumber, supplies of powder and an immense amount of personal property of different descriptions that I am not at all conversant with. The initial payment was made.

Q. How much, $5,000.00?

A. $5,000.00. I am not sure how an amount was paid to me or when it was paid; whether it was

(Testimony of George W. Shute.)

done then or whether it was extended over a period of time or just what happened. I don't know. He says that he paid me that initial payment. I assume that that is true.

Q. You are speaking of Goswick now?

A. Yes.

Q. Paying you 10%?

A. Yes. However, it ran along until October of that year and they moved off and left all of this personal property, except some dynamos that were taken off one night, which, as I roughly estimated it, amounted to approximately sixty to eighty thousand dollars. That ended my connection in every way with the property.

Q. What was the next you heard of it? [435]

A. The next I heard of it was when I went to Globe—I was in Globe one morning and Goswick came into the—well, of course I had heard rumors that they were attempting to handle the property but the first personal touch that I had with it after that time—when I was in Globe one day, Goswick came into the Clerk's office, where I was doing some work, and handed me a contract that he had made with L. E. Foster. He and I sat down and went over this contract paragraph by paragraph. I passed upon it and he said, "I wish you could meet Mr. Foster," and he took me over to what is known as the Globe Hotel and introduced me to Mr. L. E. Foster and I talked over the contract with him and his expectations and so on and congratulated him and the usual line of talk on such things. I don't

(Testimony of George W. Shute.)

believe that I was present at the signing of the contract. It does seem to me that I either wired Mr. Foster something relative to it or wrote Mr. Foster something relative to it, but in view of the fact that he says that he received no letters from me or communication, I am inclined to the belief that I must be in error about that but what it was about I don't know. That ended my connection with it entirely at that time.

Q. Now, Judge Shute, did you ever have any agreement or understanding, written or oral or otherwise, with Goswick or anyone else that you were to receive any compensation for services rendered Goswick in connection with the Foster sale or any part or portion of the price of that option?

A. Never. It was never even discussed.

Q. Now, it has developed that Goswick, subsequent to December 8, 1927, did give you money. Will you tell the circumstances, as near as you can remember, of each payment received from Goswick since that time. [436]

A. Yes, and Goswick stated that he had paid me 10% on this first payment. I am quite positive that he is in error in that. I don't believe that he paid me anything on this initial payment at all. Why he would, I don't know, and, if he did pay me anything, it has completely passed out of my mind, but that is liable to be the result.

Q. Let's see, Judge Shute. Pardon me just a moment, now. I have discussed this matter with Goswick since from time to time—if this refreshes

(Testimony of George W. Shute.)

your mind—do you remember Goswick offering you that money and you suggesting to him that he might never get any more and he had better keep it?

A. That is what impresses me now, because I remember that conversation very clearly with him.

Q. Suppose you state that conversation.

A. I do remember that he wanted to pay me out of this initial $5,000 payment, and, being conversant with these objections and knowing how hazardous they are, and how few of them have come to pass, I told him that he had better keep his money; that I had not done anything for it and that I would not charge him for the little thing that I had done for him, being simply looking over the contract. That is why I think he is in error.

Q. What, if any, reason did he give for desiring to give you $500 from that at that time?

A. Well, in the first place, he knew that I had examined this contract for him. He knew of the expenditures that had been made and of the many things that I have done for him in past years and, primarily, in his mind, was the benefit which he had received from the first contract which I had had with him, which resulted in his making the second deal.

Q. State whether that particular feature of it was mentioned. [437] A. Yes.

Q. What did he say about it?

Q. Well, he, I think, mentioned that if it had not been for the fact that I had done this work on the first option with Stalker and with Mr. Bedford

(Testimony of George W. Shute.)

that he could not have made the deal with Mr. Foster, the road that was in there, the personal property that was there and the houses, the facilities that were there, the supplies that were there, the work that had been done in the development of the property had all redounded to his benefit.

Q. Well, when was the next time that you received money from Goswick?

A. Not until, I think, some time in August of 1927.

Q. How much was that?

A. I don't know. I don't know to save my life. I can't tell you how much came in but it came in at one or two or three little intervals in amounts that I don't remember. In checking back over the bankbooks, it seems as though there was $295.00 came in at one time and $500.00 came in at another. Outside of that, I am not prepared to say how it came in and those came in a way that I would like to explain.

Q. All right. Go ahead.

A. Shortly after the sale to Foster, under the Foster option, some sort of a controversy arose between his son-in-law, Packard—Bill Packard, and himself. As I understand it, my first communication came from Packard himself, who told me he was an owner in that property and owned a half interest in it. He wrote me a letter to that effect and asked me if I would not see Goswick and try to get a deed from Goswick to a half interest in the property. Having [438] been perfectly familiar with these

(Testimony of George W. Shute.)

men all my life, I took Packard's statement for it for just what it was worth, drew a deed in which Goswick was to deed to Packard an undivided one-half interest in the mining claims and sent the deed to Goswick, with a letter stating to him that if it was agreeable to him and that was his understanding of it, that, in my opinion, Packard ought to have a deed to the property; to take it before a notary public and get it out of the way. He told me after that at the very first meeting I had with him that he did not sign the deed—he denied that Packard owned any part of the claims at all. He told me that he did have an arrangement with Packard, whereby he was to split the proceeds of the sale with him, in case a sale was made, for benefits which Packard had extended to him in the location of the claims and the furnishing of grub and so on upon the property. That must have been some time—I will put it roughly some time between the 1st of January and the 1st of June.

Q. *od* 19—

A. 1927. The dispute, after Goswick refused to deliver this deed, became somewhat strained. At least, the situation developed very rapidly to the extent where Packard deemed that it was necessary to do something to either realize from the claims or to get out. He and his wife came to see me. His wife came in the office first. This is Goswick's daughter, whom I have known for many, many years, and immediately launched into a story of the trouble that was taking place between her husband

(Testimony of George W. Shute.)

and her father, and told me that something ought to be done to eliminate it, because it was rather a strained relation. She cried a little bit and about that time Packard came into the room. They both sat down and told me that he had come down to try to [439] straighten up that business and wanted to sell me his interest in the claims. I explained to him that I could not buy it and explained to him that even if he did have an interest in the claims that it would not be right for me to buy in upon a dispute which had occurred between these two men, in view of my friendship for both of them, and told him it would be wholly and absolutely unfair to him because, if he sold before the option went through and it was finally exercised, that the amount that he would take from me under such a contract as he offered to me at that time would be wholly unfair to him and I turned it down. His wife said to him—turned to him said, "That is just what I told you that Judge Shute would say. I told you there was no use in coming down here to see about that." I talked to them at some length and assured both of them that if there was anything in the world I could do I would do it very gladly, in order to help them out of the situation. In the course of this discussion, which ran from that time on until in August of 1927,—just when it first cropped up, I don't know—but probably at the latter end of it he told me of a claim which another son-in-law had against the property of $50,000.00—told me that Jess Henderson was claiming $50,000 out of

(Testimony of George W. Shute.)

it, which was an amount over $150,000.00 that had been received from the property. I knew nothing at all about that understanding or that contract or that agreement or anything at all about it. It is entirely foreign to my mind. However, at this same time, Packard insisted that I was entitled to 10% of it, and had several times stated, "Had it not been for the fact that you had made this first deal with Goswick,—or Stalker, we would never have been able to have made the deal that we did make with Foster." [440]

Q. What did you say to Packard?

A. Well, I don't know what reply I might have made to that. The result of that was, after a considerable amount of negotiation—one of these payments was due on June 8, 1927. That was the $10,000 payment. I must necessarily depend somewhat on what Goswick tells me to make a complete connected story. Goswick tells me that on the 8th, when the first payment was due, he went to Globe and L. E. Foster gave him a personal check for $10,000.00. Goswick had married in December of 1926. Now I admit I might be off on that year, but anyhow Goswick had married and he and his wife, when they went to make this—to check up on this payment, this $10,000 payment, were on their way to California. The bank would not honor this personal check or would not credit to Goswick the $10,000 personal check until it had cleared. I think that he told me that they wired to ascertain if it was all right and the wire that came back was

(Testimony of George W. Shute.)

a little bit vague or something of that sort but at any rate he did not delay his trip to California. He came through Phoenix and stopped a short time and asked me if I would keep in touch with this situation and notify him at La Jolla if the check was all right. I did that. I think I telephoned up to the bank and asked them to let me know when the check cleared and they did it. I think I notified him at La Jolla. If I did not, I attempted to or did not get him there. I may be a little off as to whether he got my wire. It seems to me like he had moved from La Jolla and had gone to visit some relatives of his wife and they did not get the telegram. During all of this time in this interval, Packard was insisting on something being done and at one time wrote me that something had to be done about it; that he p*or*posed to have his half [441] interest in those claims. I think I advised him of Goswick's absence from Arizona, or he knew it. At any rate I requested Packard, either in person or by letter, to let me know when Goswick came back and I would try and make a settlement between these two contending forces. Some time about the 1st of August—along there—of that year, I received a letter from Packard, in which he told me that Goswick was back in Arizona and to try to fix it up for him. After that some time, I went to Payson to see both of them, Packard was there and Goswick was there. I am not sure whether the trip was especially for that purpose or not, but, at any rate, I was there, and I know I was there with the

(Testimony of George W. Shute.)

intention of doing what I could to settle the controversy. I saw Goswick and talked to him about it. He was very much worried, very much aggravated, very stubborn and very obstinate about it, but did tell me that it did not make any difference what I did about the situation; that anything I would do would be all right with him, except that he would not deed any part of the property to Goswick,—to Packard. I went to Packard's house and talked with him and his wife for a long time. At this conversation I think I told Packard, "Now, Bill, you know that so far as my relations with you and Wes are concerned, you can't hardly expect me to favor your viewpoint of it, in view of the fact that this is a contest between you and Wes, because you know that he and I have been friends that have been steadfast during all of these many years." He said to me then, "How about me? Haven't I been just as good a friend to you as he has? Don't I want to do as square a thing by you as he does?" I says, "That is not the question at all; that is entirely through, and I *don't you* to feel that I am at all imposing upon that friendship, or that I want to [442] sacrifice it or I want to lose it, but what I want to do is to try to arrive at some figure which will enable me to settle this between yourselves," and we talked it over—he was adamant for a long time upon the question of title. He wanted that title. That was his and he was going to have it. "That is the only thing I can't do for you, Bill. Can't you forget it? Can't you arrive

(Testimony of George W. Shute.)

at some sort of a money settlement here which will be satisfactory to both of you, so that both of you will be satisfied?" In the course of the conversation we talked about this $50,000 which he said that Jess Henderson was claiming as against the property, and he talked about what he said I was entitled to out of the property and rather stressed the fact that he would be only too glad to pay me out of the property at all times, with the result, as we neared a conclusion, that I said to him, "Now here, Packard, you are not interested in this Henderson claim at all?" "No, I am not." "You are not interested in anything that might be paid me out of it?" "No, I am not." "All right, now, if we eliminate those two items from the purchase price here and the balance should be divided equally between yourself and Goswick, would that be satisfactory." "No, it would not." His wife was there and she began to cry and told him that I was talking sense to him and that he had better listen to me; that there could not be any other conclusion reached, other than that would be a very fair thing, if it could be done. I am not so sure but what he and his wife went off and talked it over in the back room; I am not positive about that but it does seem to me that they did have a little talk about it, with the result that finally he says, "If he will agree to that, I will do it."

That was done, and that is the way the settlement was made [443] between him and Goswick. Now, the June payment had been made in to Gos-

(Testimony of George W. Shute.)

wick under the terms of the option in the bank but, as I understood it, between Packard and Goswick, no money had been divided at all, owing to the fact that these strained relations between the two of them—they would not talk to each other about it at all. After this deal was made I incorporated that into a notice to the bank, with a little agreement between the two of them that expressed our understanding of it and that concluded it. Now, the bank records—my deposits show that right at that time—immediately after that action that I received at one time $295.00 and another $500.00. The way those were paid, whether they are accurate or not, just what the amounts were, except for those deposits, I don't know. I do remember that at one time when Goswick and I were talking about this—the benefits they received under the Stalker option that he had paid me, he gave me $500.00, but whether it was the $500.00 at the time that this was written or that this agreement was made, or at another, I am not able to say. It does seem to me that they are the identical things and are based entirely upon that benefit. I think Packard had gave me a check for $495.00 for what he considered I was entitled to for that amount.

Q. Did those items, Judge Shute, go to make up, on your return in your income tax of 1927, as commission received from Goswick?

A. Those amounts, as I remember it, were the amounts that I put in to make up the acmounts that came from Goswick.

(Testimony of George W. Shute.)

Q. Do you remember the circumstance of your telling Mrs. Parry about that particular item to be included in your income tax? [444]

A. No, I do not. I know that Mrs. Parry would come in and say, "I am making out this tax. Have you got any other moneys that ought to go in here?" I would probably tell her just what it was and she would take it and work it out. I am a little bit ashamed of that $2,000 check for this reason; at the time that we had made this settlement—these things, of course, did not take place in quick succession, and in the order, probably, in which I have told them. They were a very lengthy thing and went through in a lecgthy series of steps. After this settlement was all made and the papers were all signed up and everything was done, I was talking with Goswick at their camp and he was elated. He told me at that time—he said, "I will tell you right now that you don't know how I appreciate getting this out of the way, not only for Rhoda's (?) sake, who was his daughter, but for the sake of the family as well. It has been nothing but hell around here ever since this thing came up, and I want you to know that I am certainly going to remember you, if this next payment comes in. I did not pay any particular attention to it, except that it registered with me just what he had in mind. I did not make any response to it or anything of the sort. The $2,000 payment, after I had gone back over it and talked to Goswick and checked it up and found out the ins and outs of it, the $2,000 came back to me

(Testimony of George W. Shute.)

or came to me. The record shows that on the day that it came in, I deposited it or one of the girls had been and deposited it, and I am inclined to think that the latter is true, and I kept a hundred dollars from it for some purpose or other and it went into my checking account and was dissipated in the natural course of my checking out. That is the $2,000 transaction. I am ashamed of it for this reason, when I was being examined about [445] that check,—I mean about the deposit of $1900, I could no more hook on to it than I could fly, and the thing, it seemed, had left my mind completely. Probably it was camouflaged by the fact it was $1900 instead of $2,000 and with the fact it was hugging in very closely with these other transactions which will probably come out here. I just simply could not account for it and turned mental gymnastics in attempting to make up that $1900 deposit from every conceivable source that I could think of to justify Judge Nealon and Miss Birdsall of just the source of that money. That is why I was—I should have said I can't remember and gone to my books and begun to find out where it was and have worked it out for them, which I did do later. I did receive other money from Goswick. That was June 8th, 1928; that was $8,000, and the circumstances under which that was given me were: I had been called to Globe by Goswick to check up on a number of royalties that had been running through the year, from the 1st of January or from the 8th of December of the previous year down to

(Testimony of George W. Shute.)

that time, which he could not get through his head. This contract provided for the payment of a certain royalty out of ores reduced and disposed of and the royalties were to come out of the payment on the property, plus an amount which they were paying him of $150.00. He could not get the idea, some way or other, just how I don't know, but he asked me if I would not come over and straighten it out there at the time that this other payment was due and I went over for that and the same day for that purpose went down to the bank with him and checked over the royalties, checked on the amounts and fixed it up for him until it was satisfactory. He says that I asked him for money. I don't remember that I asked him for money at all, but [446] I do know there was a running fire of talk and conversation and joking back and forth about the amounts until finally he invited me to come up to his room, where he and his wife were, over what is called the White House—lodging-house there and he gave me the $8,000 there, in currency. I have not received any further sums from Goswick, not a cent. I recall writing to Mrs. Holmes in Boston in November 17, 1927, that I was expecting to receive or have in $2,000 in December, from which I was to make some payment on the mortgage on my house.

Q. At that time did you have in mind the statement that Goswick made to you that when that $2,000.00 payment would come in he would certainly remember you?

(Testimony of George W. Shute.)

A. That is the exact reason for it.

Q. Judge Shute, do you recall, when you went back to see Goswick, after you talked with Packard, in which you outlined to Packard the plan to deduct $70,000 from the total of two hundred and divide the remainder between them, whether you told Goswick the manner in which you had arrived at that figure?

A. I think I did. I am quite sure I did.

Q. Did you, at any time subsequent to December 8, 1926, at the time this contract was executed between Goswick and Foster and his associated, have any agreement or understanding with Goswick that he was to pay you any money? A. No.

Q. State whether or not the payments that Goswick has made to you or the sums of money that he has given you were voluntary contributions by Goswick. A. Every one of them.

Q. Judge Shute, I neglected, when you were testifying to your savings account, to ask you how the property at Gurley, I [447] mean the property in Prescott, which you stated was your wife's came to her? A. How it came to her?

Q. Yes; you stated that she had property in Prescott which you sold.

A. She acquired that property,—well, that is property that she and her aunt, Mary D. Cullumber, and her grandmother, as I understand the story, had owned there from long prior to her marriage. Mrs. Shute's connection with it, as I understand it, up to a certain point, was that she and

(Testimony of George W. Shute.)

her aunt were keeping up the property and trying to keep it together and her aunt was using her money that she was making while teaching for that purpose. Mrs. Shute did not teach school for some time after our marriage; she did before.

Q. Well, what was done about the conveyance of it?

A. Well, the story about that is this: In 1910 or 11, Aunt was occupying the property in Prescott. All of that property stood in Mrs. Cullumber's name. *She taken* violently ill. Mrs. Shute was communicated with and she went up to take care of her and found her in a critical condition and the result of it was that she wired me that Aunt Mary, as we always called her, was not expected to live and to please come up and I went up. The property was deeded to me at that time. It was talked over. She was in a very critical condition and it was talked over and decided that the property should be deeded to Mrs. Shute. Mrs. Cullunder herself, I think, even before I had gotten there, or about the time I got there, got Charlie Herndon to make out the deed and, when it was ready to be signed and everything, it was discovered that the deed, instead of being made to Mrs. Shute, as it should have been, was made to me. [448] We did not attempt to change the deed or to have it redrafted but let it stand as it was, because it was all right between us and we had no desire or anything else to avoid it and the situation was critical, and that is the way the deed came to be made to

(Testimony of George W. Shute.)

me. It was left to stand that way and Aunt Mary died very shortly after that—probably a day or so after she had executed the deed.

Q. Were any of your earnings invested in that property?

A. Never a dollar that I know of after we were married until after Aunt Mary's death.

Q. Did Mrs. Shute own any interest in this property? Before the title was vested in her?

A. Mrs. Shute always owned a half interest in it.

Q. That she inherited?

A. It came down through her grandmother and through an understanding which she and Mrs. Cullumber had.

Q. Judge Shute the next assignment in opposition to your discharge, under the head of knowingly and fraudulently concealing property from the trustee, to wit, Lots 1, 2, 3, and 4 and the south half of 5 in Block 45 of East Globe, in which it is alleged that property passed to the trustee under operation of law and that it should be a part of the estate and that you did not list it; will you state the circumstances surrounding that property? What is the state of the title? A. At this time?

Q. Yes, go into the history of it, acquiring of it and start at the first of it.

A. At the time that I went to Northwestern, we had owned a little house.

Q. That was in what year now? [449]

A. That was in 1906, I think. I may be a year

(Testimony of George W. Shute.)

off, but that is approximately correct, I think. When I went to Northwestern we had owned a little house at the corner of Devereaux and Maple Street, which I will call the Maple Street property. Mrs. Shute went to Northwestern or went to Chicago with me. She was not going to Northwestern, but she went to Chicago with me and, when we left, we had leased this Maple Street property to a renter for a full year. I did not quite complete my year at Northwestern. An illness of hers and other things forced me out just before I completed the first year at Northwestern and forced us back to Globe some four or five or six months—something like that—four or five months anyway, before the expiration date of this renter's lease on the property, which has been leased for a year. That necessitated our finding other places to live and we went to live with—got a room with a woman by the name of Mason. We lived there some little time. When I came back from Northwestern, I owed quite a little bit of money. Her illness and other things had necessitated an expenditure that I could not stand. I had only figured, of course, on just about enough to take me through the year at Northwestern and I sold the Globe property—this Maple Street property, without asking Mrs. Shute anything at all about it. This was in 1907, I think. The deeds or whatever they were, we made will show that the date to a certainty, and took the deed to Mrs. Shute to sign, without telling her that I had made the sale or without making any explanation of it.

(Testimony of George W. Shute.)

She had grown very tired of living, as she had lived, in this room in this house that I am telling you about, and when I presented the deed to her and she saw that the place that she expected soon to live in was gone, she flew into a rage and tore the deed up and refused to sign it. Later she apologized for it and told [450] me she was sorry that she had been so nasty about it and would sign a deed, if I would draw it up, but she was going to Prescott and was going to remain in Prescott until she had a home to live in, and that she wanted it understood from that time on that the home would always be hers, so that I could not repeat the process of selling it over her head without consulting her about it before I had committed myself to that sort of a proceeding. That was perfectly all right with me, except the going to Prescott. I prepared the deed, she signed it and the property was deeded, and Mrs. Shute left for Prescott. After she was gone, I tried to get another place and finally bought a place on Devereaux, that I will call the Devereaux Street property, which was purchased, I think, in 1907 or 1908, from John H. Moorehead. I notified Mrs. Shute and she came down, and for a time we went into possession of the property and, in accordance with the understanding which I had with her, I deeded the property to her immediately after her coming to Globe—probably only a week or ten days after she returned to Globe. I deeded this Devereaux Street property to Mrs. Shute and we continued to live in that Devereaux Street property

(Testimony of George W. Shute.)

from that time until 1920. In 1920 she became dissatisfied with living there, and, eliminating much of the little steps that amount to nothing, became interested in the property that is the subject of this controversy at the corner of First and Sycamore Streets, and we bought the property at the corner of First and Sycamore Streets. The property was originally purchased from a fellow by the name of Sanders, and was deeded directly to Mrs. Shute and the deed stood in her name and has stood in her name from that time on down. [451]

I sold the Devereaux Street property. I was just about to speak of that. The transaction, as I remember it, was somewhat complicated, with Sanders, with John Griffin, with Hoyt Medlar and the effort that was made was to include this Devereaux Street property in the Cottonwood property, which was finally done, with the result that $3,000.00 was credited upon the purchase to Sanders by Griffin to the bank upon the purchase of the Cottonwood property, through the medium of the Devereaux Street property. Do I make myself clear? The Devereaux Street property actually went in as a part of the purchase price of this property involved here and became a part of it. The remaining part of the purchase price was borrowed from Mrs. Holmes, $3000, and was paid by myself, that is, most of it paid. My reason for omitting that property is that it is Mrs. Shute's separate property and has been always. I certainly did disclose the condition of that property to my trustee at my first ex-

(Testimony of George W. Shute.)

amination. I have withheld possession [452] of that property from the trustee. The trustee has not taken any steps to reduce it to possession, although he has been frequently requested to take some steps, because he served a notice upon the renter that was there not to pay the rent, which resulted in rather an aggravated condition, but he has not, down to this minute, taken any step to reduce it, if he can do it. Mrs. Shute has been subpoenaed as a witness one time in these bankruptcy proceedings in regard to the property that she claims to own, but so far as I know that is all. Mrs. Shute has employed her own counsel in the case in regard to the bank account and the property at Globe. Right immediately after this first meeting, when I saw that they were going to question her right to the Globe property, and to other property that I knew belonged to her, I told her that she had better have separate counsel in the matter, so that she could protect herself in the same of any claims that might be made. She asked me who I thought would be good counsel for her. I told her that I thought that Clifton Matthews was probably without a peer in Arizona, and that I knew that he would take care of it for her and take care of it properly. She asked me if I would see Clifton Matthews for her when I was in Globe some time, and I did. I saw him and asked him if he would represent her and he said that he would be very glad to do what he could for her and called her up on the telephone and talked to her over the telephone about it. Later, she went up herself and saw

(Testimony of George W. Shute.)

him and laid the matter before him, as I understand it, as fully as she could. In that conversation with Clifton Matthews I disclosed to him the facts in connection with the savings account and the residence property as I have testified here before the court. Mr. Matthews' advice as to the state of the title of the personal as well as the real estate, was that there was no doubt but what it was her separate estate. Some of the income from this property has been applied to the payment of interest on the Holmes [453] mortgage. Referring to the next assignment, which is fraudulently withholding from the trustee and fraudulently omitting from my schedule —has to do with one Essex car described as serial number 640003 of the value of $600.00 which it is alleged I failed to list and that I fraudulently and knowingly concealed from the trustee, I will say that during all of the time since I have been engaged in the practice of law with Armstrong, Lewis & Kramer, my work has called me to various parts of the state, where I have been engaged in the litigation of different cases and, in going to these different places I used the automobile that I had when I came down from Globe. The result of this was that I left Mrs. Shute without any method or means of conveyance at all or with no way of getting about to any place that she might want to go. This was particularly true after Virginia's marriage, when she had moved over to Gilbert, when Mrs. Shute desired to visit her, which she has done very frequently. The need of some method of conveyance

(Testimony of George W. Shute.)

was very keenly felt, with the result that at Christmas-time, 1925, I purchased from J. A. Pinon (?) in Globe a little Essex car, upon a conditional sales contract, and gave it to Mrs. Shute at Christmas-time of that year. This little car was retained and kept until in August, 1927, when the new issue of Essex came out, when she turned it in to get as high a trade in value as she could on it at the time of the coming out of the new series and got a certain amount on it that I don't remember exactly, the rest of which I paid out myself for her. That is the car in question, which was delivered to her in August of 1927.

The title to both of the cars, both of the original one and the subsequent one was taken in Mrs. Shute's name and license issued to her. I also discussed the Essex car with Clifton Matthews and described the situation as I have here; he told me that it was undoubtedly a separate estate. I think in my discussion with Matthews I told him of my financial condition prior to giving this [454] first car to Mrs. Shute. I went into it just as far as I could with him and that particular point was discussed. I told him just what the facts were, and he went over them and we considered whether or not the car was hers and he said without any doubt the car anyway was hers, subject to any action that the trustee might take against it; that he might set it aside. He was not prepared to say at that time whether or not the trustee could set it aside, but, until he did set it aside, that is, between Mrs. Shute

(Testimony of George W. Shute.)

and myself; that until the trustee did take some affirmative action, without any doubt in the world, the car was hers.

Regarding the next specification under the first paragraph, of knowingly and fraudulently concealing property from the trustee, involving the sum of $995.00, which is alleged to be an amount which I paid in the month of December, 1927, to A. E. England by check on the First National Bank on the Wentworth car, I made an arrangement with England, whereby the Wentworths bought a car. England is a client of mine. They came down, selected the car and paid four or five hundred dollars on it. The exact amount, I don't know. I think it is $400.00. By means of a cashier's check. After that time, between that and the selling of the little car that was turned in on the transaction—not turned in but left there for sale, they gave me the amount of money necessary to complete the payment of this car, which I did. That is all there is to the transaction. The first $400 was, I think, probably turned over to England by Miss Wentworth herself. The rest of it came along in different amounts at different times until the full purchase price of the car was paid out. That $400 was not a part of the $995. This $995 was money that was given to me by Miss Wentworth, who lives at Globe, to apply on this contract. I never had any right, title or interest in the Wentworth car and this $995.00. The whole situation was explained to the trustee and to the creditor, I think, at the first

(Testimony of George W. Shute.)

meeting by [455] myself, as well as by the A. E. England Motor people. At the time I filed my petition in bankruptcy, Miss Wentworth did not owe me anything, and I paid none of my earnings into the purchase price of that car.

Referring to paragraph H under the same general assignment of concealing property, involving the La Prade transaction, why not let it go just as Mr. La Prade said it was because that is just the way it happened. After the check came in I took it up with Mr. Nealon and turned the check over to him, and that was all there was to it. Long prior to the time I filed my petition in bankruptcy, the knowledge had come to me that Cornelius was a slicker and had cheated all of us.

The phonograph is in the same status exactly as the little Essex car. It was given to Mrs. Shute as a Christmas present a year ago last December—December, 1927. The payments on that had not been completed entirely at the time of my bankruptcy. I think there was $50.00 or something like that due on it. That was bought just on open account and I paid the amount out as a sort of monthly payment thing.

Taking up the third assignment, which is objection to my discharge for the reason that I committed an offense punishable by imprisonment under the Bankruptcy Act in that in the course of proceedings in bankruptcy when examined before the referee at the first meeting of creditors, after being duly sworn I knowingly and fraudulently made a

(Testimony of George W. Shute.)

false oath in answering the following question propounded to me under examination: "Q. (Referring to Hudson car owned by said bankrupt at the time of the filing of the petition:) You have made no payments except the work you have done for him? A. That is about the way it would figure out; I don't think I made any cash payments at all." The record appears that way. However, in making that statement what I had in mind was what the subject of this controversy always was, namely, the throwing-off [456] between the dealer's price and the buyer's price.

The fifth assignment is making a false oath in reference to the following question propounded to me under examination at the first meeting of creditors: "Q. Since that time (January, 1924) how much have you received from the firm's business (referring to the firm of Armstrong, Lewis & Kramer). A. Well, I can only give an approximation, but I think it is pretty close. I think the first year I received about $5500; that was in 1924; in 1925, I received between $5500 and $6,000; I think in 1926 it was about $8,000; I think the last year I received somewhere in the neighborhood of $10,000; that is about right, I think." It is alleged that my answer to that question was false as to a material fact and that I received $15,250.00 in 1927, instead of ten. When I stated that I was testifying entirely from recollection. That was my recollection. I knew that the books of Armstrong, Lewis & Kramer were carefully kept by a competent book-

(Testimony of George W. Shute.)

keeper and would show every penny of the money that I had received and, answering it approximately, I answered what I thought was right. Immediately after I made that answer I was asked the question "You have no books available?" and I answered, "The firm books show my earnings." A short time after that examination I furnished the trustee with a statement taken from the books of Armstrong, Lewis & Kramer which showed my earnings during the period in regard to which I testified. That statement that I furnished showed my earnings from the firm during 1924 were $5,-987.50.

Regarding the sixth assignment, which is that I made a false oath in answering the following question: "How much have you drawn from the firm (being the firm of Armstrong, Lewis & Kramer) since the first of the year?" And I answered, "I think about $500 a month. There has been no dividend in April." I do remember testifying that there was no dividend in April. My [457] recollection of it is that I was being examined at considerable length upon the reason of the borrowing of the $750 from the bank. I testified, and it was in my mind that the material thing was—the reason for the borrowing of this money from the bank, and the reason for it was that there had been no dividend in April, meaning by that there had been no dividend paid in April up until the time that I got this money from the bank, showing a reason for the borrowing of the money, and not for the

(Testimony of George W. Shute.)

purpose of attempting to evade anything in the world that the trustee may have wanted and, had he asked me about it, the same answer would necessarily have been given; that the firm books would show every penny of my income from the firm,—every penny of it.

Judge Nealon and Miss Birdsall both knew that that was what the situation was because it was particularly discussed at these meetings. I can't remember whether there was a discussion between myself and Mr. Lewis and Judge Nealon and Miss Birdsall at the first meeting of creditors on May 1st about furnishing records which was not reported in the proceedings. I don't remember about it, but I do know there was always a lot of discussion about it and always offers upon my part to co-operate with Judge Nealon in any way possible to help him arrive at an absolute certainty as to what the condition was. I was always testifying from memory. I had not examined my memorandum at the office or books before testifying, so as to refresh my mind as to exactly when the dividend had been paid. I had no idea before I took the stand that I was going to be asked when the dividend was paid. The statement that I furnished the trustee a few days after my first examination discloses that on the 10th day of April, 1928, I had in fact received a dividend of $775.00.

Referring to the seventh assignment, that I made a false oath in answering the following question: "In addition to that (referring to receipts from the

(Testimony of George W. Shute.)

firm of Armstrong, Lewis [458] & Kramer) then, there should be other amounts that you have received in order to make the books complete?" To which I answered, "That depends on the way you look at it. You will remember that I told you about the little block of stock we sold after we came down here. There was also a little Mrs. Shute owned in the Iron Blossom, I think it was called; there was 100 shares of that. We sold that and I used the money. There may be two or three small instances like that, but except in very small items of that kind, the income was from the firm." I don't think that prior to being placed on the stand at the examination which was on the 29th day of May, 1927, I had been advised that I would be called upon to give a detailed statement of earnings received by me from sources other than the firm. At the time I made that statement I did not know it was false. I certainly did not make it for the purpose of defrauding anyone. My present recollection is that this question and answer was propounded on May 29th and that prior to that time I had furnished the trustee with a statement with my receipts from Armstrong, Lewis & Kramer, together with bank statements and canceled checks covering the time. That was the meeting at which they took up the checks and statements and examined about it. As to it being a fact that the bank statement that I furnished at that time would show large deposits and large receipts that were not shown on the statement furnished by Armstrong,

(Testimony of George W. Shute.)

Lewis & Kramer as the earnings from the firm, I am quite sure—I know that I told Orme Lewis and it seems to me that I told Mr. Nealon that everything—every business transaction that I had had of every nature had run through the First National Bank and that this—my deposit slips, my checks and bank statements would have a key and an index to everything that I had done from the time that I opened my bank account with the First National Bank down to that minute. There was a key, in there, I think, to every single transaction, without exception. All of that information was in [459] the hands of the trustee at the time I answered that question.

Referring to the eighth assignment, which was predicated on alleged false swearing in my answer to the following question propounded to me at the creditors' meeting on the 29th of May: "Q. During all of this period, did you receive any large sums of money from other sources other than those that you have testified to? A. I think I have testified to all of them, either at this hearing or the other one." The answer I have given in regard to the preceding assignment, No. 7, applies exactly the same way to this one. I probably should have answered that a little different but, having in mind the fact of the overtures,—offers that I had made to get these checks and stubs and things of that sort, which constituted the only record I had of all these different business transactions and the key to them, I an-

(Testimony of George W. Shute.)

swered it because of that thing. All of it had been delivered to Mr. Nealon at that time.

Referring to the ninth assignment, in which it is alleged that I gave a false oath in answering the following series of questions propounded to me at the first examination on May 29th: "Q. You have no interest in any mining property? A. None at all. Q. Any mining claims? A. No. Q. Have you represented any companies over there in any way as counsel from whom you have received fees since being in Phoenix? A. I cannot think of any. It would be on the books here if I have. Q. You have received nothing that would not show on the books of Armstrong, Lewis & Kramer? A. I don't think so. Q. From Globe companies or from interests you have there? A. I don't think so." Stating what I have to say in regard to any fees that I had received from companies in Globe, if I answered it now I think I would answer it the same way I did then. That is that all fees that I received from any companies at Globe or any other place pass through the books of Armstrong, Lewis & Kramer. It is alleged that my answer [460] to that was false in that I received $20,000, the money that I received from Wesley Goswick, which had not been taken into account and was not showing on the books of Armstrong, Lewis & Kramer and constituting this series of questions and answers as perjury. I have already testified that the money I received from Goswick was by the way of a

(Testimony of George W. Shute.)

gratuity. I testified as fully to it, I think as can. My answer this time would be the same.

The tenth assignment, which is predicated on an alleged false oath made by me in testifying before the Referee on May 29th, as follows: "Q. When was this $500.00 payment received from Mr. Goswick? A. In December, 1927. Q. Have you ever received any other amounts from him? A. Only for fees; they would go into the firm. Q. This $500 was not fees? A. No. Q. Have you any interest in these options of Goswick's? A. No. Q. You do not expect to receive any other amounts from him other than this $500? A. No. Q. If he should send you any more money, you would be surprised, would you? A. I most certainly would." That is alleged to be false, in that I have received from Goswick, during the month of December, 1927, the payment of $2,000, which was in addition to the $500. I would only say that is $2000 that I have just related. I can't add to it or take anything away from it. That is just the situation. That $2000 had completely escaped my mind. I did not even return it on my income tax, for some unknown reason.

Regarding the eleventh assignment, which is that I have made a false oath and rendered a false account in relation to my proceedings in bankruptcy because on the 17th day of April, 1928, in my schedule subscribed and sworn to before Mrs. Conger, a notary public, I failed to schedule my indebtedness to the First National Bank in the sum of $750.00. That matter was discussed and I knew

(Testimony of George W. Shute.)

that there was going to be no claim filed on behalf of the First National Bank and it was in my mind that it was not [461] necessary; that no part of it was going to be paid out of this estate and it was not listed for that reason. I always thought that, in view of that fact, that any result of it would redound to the benefit of this creditor and that it would not be necessary at all.

(Examination by Mr. LEWIS.)

I do not think I discussed the matter of listing it with anyone besides yourself. I discussed of course the whole matter with Mr. Armstrong on two or three occasions, but I don't believe that I discussed the question of listing with him at all. In fact, I did not bother him with any of the matters after the proceedings started. In the eleventh assignment it states that the amount of $650.00 which was the consideration of the note in question, was not satisfactorily accounted for. I think that that fully appears upon the statement. I did not understand that it had not been accounted for. As I explained at the time, the money was borrowed primarily for the purpose of paying up the current bills, so that there would be none of those back, and that took a certain amount of it and I paid other little amounts that I do not have clearly in mind at this time just what it was.

Regarding Assignment 11–B, which states that I made a false oath as to my liability in the estate in that after being sworn I made a statement of all my assets, both real and personal; that the only assets scheduled were real estate of the value of $250; books, prints and pictures, $25.00; deposits

(Testimony of George W. Shute.)

of money in the bank and elsewhere, $15.67; certain mining stock listed of no value, making a total of nonexempt assets of $290.67; exempt property, household goods, $250.00 and other personal property, consisting of a law library and office fixtures of the value of $750.00, when in truth, my assets at that time were in excess of $30,000.00, being one Hudson car, motor No. 495579; life [462] insurance policy with a cash surrender value of $746.85; savings account No. 19061, in the First National Bank, in the name of Jessie M. Shute; one phonograph of the value of $200.00; the sum of $250 deposited by the bankrupt with Arthur La Prade; one Essex car, No. 640003, of the value of $600.00; lots 1, 2, 3, and 4 and the south half of 5, in Block 45 East Globe townsite, of the value of $5,000.00, and the Goswick contract that has been mentioned before; and undivided interest in the assets of the firm of Armstrong, Lewis & Kramer, of the estimated value of $5,000. With regard to the life insurance policy, I testified to that fully and cannot add anything to it. The same applies to the savings account of Jessie M. Shute. I have also testified as to the value of the phonograph of $200.00 and the $250.00 deposited by me with Arthur La Prade. I have also testified as to the Essex car valued at $600.00 and have covered in my testimony the Globe property and the alleged contract with Wesley Goswick. As to omitting to schedule the undivided partnership interest in the assets of the firm of Armstrong, Lewis & Kramer in my first schedule, it was omitted in the first schedule because of a peculiar sort of a mix-up there was over the

(Testimony of George W. Shute.)

contracts and with no idea in the world of avoiding or attempting to avoid anything that really belonged to the trustee under the partnership accounts. That is the only reason for it. The trouble arose over an interpretation of the contract that there was quite a little bit of difficulty within the firm until the matter was finally settled as to just what the contract meant, which occurred along about or right at this time. Mr. Moore and I occupied a different relation toward the firm than the other members—than the other three members of the firm. I just know that I had that impression. I probably could read over those contracts and go back down through the different partnership agreements and specify exactly what the situation was. My recollection of it is that [463] when I came into the firm, of course, it was an old, established, going concern, with thousands of dollars on the books of the company, that I had had no part in whatever in earning or accumulating, both old and new accounts that were being run and, when I came in, they were generous enough to me to put me right in with those old accounts, just as though I had earned them, and attempted to provide for it in a way by providing in the contract that upon a dissolution of the partnership agreements that I would leave without participating in any of the earnings that I had accumulated during that time or had made during that time.

(Examination by Mr. MOORE.)

Referring back to my failure to list the note that I owed the First National Bank of Arizona, I have

(Testimony of George W. Shute.)

had practically no experience in the practice of bankruptcy law. As a matter of fact, up until the filing of my schedule, my entire practice in bankruptcy consisted in filing one schedule that had already been prepared by someone else. I was under the impression that under the law I was not required to list or schedule every debt I owed, especially this particular one. Mr. Lewis and I had discussed it a little bit. I knew there was going to be no claim filed and I just put two and two together and thought, "Well, there is no use in putting in a claim that is not going to be filed, because it amounts to no claim against the estate at all and whatever may result from it would be to the benefit of the creditor," and just let it go for that reason. Referring to paragraph 10 of the agreement of partnership of Armstrong, Lewis & Kramer, which is dated the 1st day of January, 1924, in evidence as Creditor's Exhibit No. 22, "The new firm will assume and pay all the obligations of the old firm. All earnings of the old firm of Armstrong, Lewis & Kramer collected or received after January 1, 1924, shall be regarded as earnings of the new firm and treated and distributed accordingly. In view of this provision and of the fact that [464] neither the said James R. Moore nor G. W. Shute have contributed to such earnings uncollected at said last mentioned date, then on dissolution of this new firm by the expiration of this agreement or by the withdrawal, disability or death of either said Moore or said Shute, neither said Moore nor said Shute, nor his heirs, executors or administrators shall be entitled to participate in the distribution or

(Testimony of George W. Shute.)

division of any firm earnings thereafter collected for services theretofore or thereafter rendered." I had that provision in the contract in mind which led me to believe that on the dissolution of the firm by Judge Lewis' death, I had no further interest in the earnings of the firm. That proposition had been discussed quite a bit between yourself and myself and there was quite a little bit of fear expressed that neither of us were entitled to any moneys that had been earned but not actually collected at Judge Lewis' death. As a matter of fact, Mr. Armstrong and Mr. Kramer waived any question about that provision. I have not testified fully about the specification which refers to my failure to list on my amended schedule the Hudson car of the value of $900.00. I have testified about the life insurance policy, the savings account, the phonograph, $250.00 from Arthur La Prade, the Essex car, the house at Globe and the Goswick contract. Referring to the next specification, No. 12, which is that after filing the petition in bankruptcy I knowingly and fraudulently withheld from the trustee documents and papers affecting and relating to my property and affairs to the possession of which the trustee is entitled, and possession of which is necessary to the trustee for the purpose of collecting in the assets of the bankrupt, said documents and papers, consisting of lease on house in which I live claimed to be of the value of $75.00, that lease was also not listed. That was the yearly lease, where I paid from month to month on the property where I live. It was not withheld. At the time I listed

(Testimony of George W. Shute.)

my assets, I never thought of that [465] lease at all. It is one of the things that never occurred to me was of any value or could be of any possible use to anyone else, and that was the reason that it was not listed and that is the reason why I did not think of it. I didn't know anything about it. Never occurred to me, until we got into the examination, what that was. It was not withheld from Judge Nealon or the creditor but on one or two occasions I demanded to know whether or not he wanted the lease; if he did, I would move out and surrender the property and give it to him. The question that was involved consisted in my right to live in the house during the last month of the term without paying any money and also the payment of the rent in the month immediately preceding the filing of the petition. I had paid the rent in advance. The lease provided for a monthly payment in advance and required that the first month and the last month of the lease be paid. The trustee did not ask me to move out in order that he might find a new tenant and collect the rent. The trustee would neither say that he wanted the lease or he would not but he said that he wanted the money that I had paid on the lease immediately preceding the filing of the adjudication and wanted the money that I had paid on the last month of the lease. I think at one time I told him I was not going to quarrel over a $75.00 item, if that was all there was to it—that amounted to so little that I would not quarrel with him over a $75.00 item, which was the last month of the lease but I did not pay him. The controversy over that is still pending before the referee on an order to

(Testimony of George W. Shute.)

show cause why I should not pay $150.00. I have testified in regard to my failure to surrender the Noble note. I believe that is pending before the referee. Referring to the thirteenth assignment, which is my failure to keep books of account or records from which my financial condition and business transactions might be ascertained, and that I have concealed records from which my business transactions might be [466] ascertained, I certainly have not concealed any records whatsoever from the trustee, and I have always told Mr. Nealon anything I could get for him I would get, so he might have it. I cannot remember of Mr. Nealon or anyone representing a creditor ever asking for any of my records, that I have failed to produce that were in existence. I have not destroyed any of my records. I have furnished him fully and completely all records that I have of my business. I did not keep any books other than my bank records. I kept no regular set of books. When I would get money, I would deposit it or deposit part of it and keep part of it and the checks that I have would express the amounts that had been drawn out and show the amounts that had been drawn out and the bank deposits would show the amounts that had been paid in. It was sufficient for my needs after the business in which I was engaged was taken care of. The practice of law is my only business, and the firm of Armstrong, Lewis & Kramer, of which I am a member, keep full and complete records.

Referring to the next specification, which is 14, where it is alleged that subsequent to the twelve months immediately preceding the filing of my peti-

(Testimony of George W. Shute.)

tion in bankruptcy, I transferred real property owned by me from me to my wife with intent to hinder, delay and defraud my creditors, I don't know what could be meant by that. I have not in the twelve months before I entered bankruptcy executed any deed or transferred or made a gift affecting real property to my wife. I did not within twelve months of bankruptcy transfer the property known as the Globe residence to Mrs. Shute. I never did transfer it to Mrs. Shute. It was deeded directly to her by Mr. Sanders, as I testified yesterday. If the deed is in evidence, that will show it.

The COURT.—Well, that is not the specification. The specification is that while insolvent and within the meaning and intent of the Bankruptcy Act and not having sufficient property to pay his debts [467] he transferred the above property, by disclaiming any interest therein, in her favor and by relinquishing possession thereof. That is the reading of the specification.

I have never had an interest in that property to disclaim other than what I told on my examination before the referee that I considered it Mrs. Shute's separate property. I have not relinquished possession of that property to her. I have not withheld possession of that property from the trustee. As I said yesterday, that property has always been Mrs. Shute's—always—from the time it was purchased down to the present time. It has been rented constantly at $50 a month and some of that money has been turned over to Mrs. Shute. Some of it I used myself. Some of it was paid on the mortgage to

(Testimony of George W. Shute.)

Mrs. Holmes. I have not assisted Mrs. Shute in withholding possession of this property from the trustee that I know of. I do not consider that advising her or assisting her is withholding it. I have testified to the sixteenth assignment, which is the savings account in the National Bank of Arizona. Referring to the seventeenth assignment, which is $8000.00 received from Wesley Goswick, they have never made demand upon me for that amount that I received from Goswick. I did not conceal it. Referring to the eighteenth specification, which is that I have failed to comply with a lawful order made during the course of bankruptcy directing me to file an amended schedule in accordance with the law, in that I omitted from the schedule the Hudson car, the life insurance policy, the savings account, the phonograph and La Prade $250.00 and the Essex car and the home at Globe and the Goswick contract. I don't think I was ever served with a copy of an order to include these items in the amended schedule. I think that the only thing that was ever done was while we were there before the referee and talking over the matter. I think I have testified fully as to my reasons for not including the items mentioned in my amended schedule except the [468] Hudson car. Referring to the nineteenth assignment, which is that I failed to explain satisfactorily losses of assets and deficiency of assets to meet my liabilities in that for the period commencing January 1, 1927, up to and including the date of the filing of my petition on the 17th day of April, I had cash assets in the form of income amounting to not less than $21,000.00, and that

(Testimony of George W. Shute.)

I failed to account for $7000.00 of that money, I have accounted for all money received and what was done with it to the best of my ability. I did not have in my possession at the time of my bankruptcy any property or assets that I did not list except those that have been enumerated in there, the disputed items, plus that property which I listed, constituted my entire estate at the time of the bankruptcy.

Mr. MOORE.—Q. Judge Shute, the first ground of opposition to your discharge is that you fraudulently concealed from the trustee a Hudson sedan, being Serial No. 799342, and that automobile transaction is found at various points throughout the specifications.

The COURT.—Let the answer relate to all of the specifications with reference to the Hudson car.

Mr. MOORE.—That is exactly what I was leading up to. [469]

Q. Now, will you tell the history of your automobile transactions with the England Motor Company from the beginning right on down to your bankruptcy and subsequent, in order that the Court may have a full story?

A. I cannot remember the numbers—the serial numbers or the motor numbers of the cars and will not attempt to. I cannot remember any of the dates that these things happened and, if they become material, I think they can be established by the different records in the case. The first transaction that I had with England consisted of a purchase from England of what is called the Downey

(Testimony of George W. Shute.)

(?) car, in which England transferred to me a contract from a man by the name of Downey, in Miami, who had failed to make his payments and who had turned the car back or it had been reclaimed by the England Motors, Incorporated. At the time of the purchase of this car, there was back on the contract $190.00 and some cents. England told me that I could take up the contract and go on paying the C. I. T. Corporation as Downey *sgoyld* have done. I did not pay the $190.00 but did continue with the payments under the Downey car. I think they are to the C. I. T. Corporation but I am not clear exactly on that, whether it was paid to England and then paid to the C. I. T. or whether I paid it direct, but I believe I paid this payment over to the C. I. T. Corporation. I drove that car from the time of the purchase until I had reduced the balance upon the contract quite materially and England sold the car to a stranger to me, without consulting me or without asking my advice about it. In fact, I drove the car up in front of England's place of business one day and he was there discussing or talking [470] with a stranger that I did not know. He told this stranger that there was the car—if he wanted a car, that that was the very thing that he wanted. This car was one of the old series of Hudson cars. They discussed the merits of the car and the demerits of it, so far as that goes, got in the car, drove up around the block and it was sold to this stranger for an amount that I did not know at that time. England told me that he would make the matter all right; that he wanted me to have one of the new issues of cars that was coming out pretty

(Testimony of George W. Shute.)

soon. It was all right with me. The man took the car and drove it off. Said he was going to Washington or British Columbia or Oregon. Anyway, up in the Northwest somewhere. He took the car then and I think that I either walked home or England drove me home himself. I never had an accounting with England relative to that. After a time the new issue of cars came out. England, at the time that he had sold this car, told me that he would make me a cut in the difference between the retailer's price and the distributor's price, which was his business. I did not ask him what the cut would be. Naturally assumed that it would be half of it and, with that understanding, the new car finally came and I drove the new car off. I think that the new car—I drove it from in April until October or November—along there some time—and, immediately after the new car came in, the Hudson people changed the entire style of the car, so that it had an entirely new motor in it. I did not like that and so expressed it to England and told him that I thought that that was not a very square deal; that in view of the fact that the motor had changed, that he ought to have known it. He assured me that he did not know it but said that it was causing him endless trouble from people who had bought this first issue of the new cars. I had a little [471] trouble with it. It heated and manifested other imperfections, which caused me to run it back time after time to the place for adjustment and correction and talked to the mechanic about it and he said that it was one of those cars that he just simply could not understand what the trouble with it was.

(Testimony of George W. Shute.)

That was told to England and he told me that he would make it all right with it; that it made no difference to him about that; that he understood that those things existed and that he thought that I did; that he would make it perfectly satisfactory to me. This kept along until October of that year and, when I went on a hunting trip in October, I left the car in England's basement for two purposes. First, he said that he would like to have it left there so that he could dispose of it, and if he could and, second, that was a good place to keep it. When I came back from the hunting trip he told me that he had sold the car to some person out on Central Avenue. I think he told me it was a woman. He did not tell me her name. He told me the price that he had gotten for it and he did not tell me any of the details but did tell me that he had one of the new issue of cars that I could take and that it was there. He showed me the car and told me that I could take it when I wanted to. I took the car, made a conditional sales contract on it and drove the car on out. It was the car that is in issue here. At the time or about the time that I drove the car out, we had a talk about security upon the car and I told him that I thought he ought to have some sort of protection on it; that I had been having some trouble over this matter and that he was the one who was selling me the car and, if there was any protection to be created he ought to have it. We talked over the matter and he said "Well, how much do you think you ought to put on it? What do you [472] think it ought to be?" I said, "Well, I think that $1,500.00 will be a sufficient amount to

(Testimony of George W. Shute.)

cover all of these different transactions and, when we get at the proper amount, then I can settle it upon that basis." The conditional sales contract was drawn upon that basis and was recorded upon that basis, which was done for the purpose of protecting England in these transactions, which also involved the Essex car of 1927, which was purchased for Mrs. Shute, that is, the little car of 1925 was traded in on the 1927 one and the matter ran along that way. All right. When this matter came up, the car was practically a new car. Anything that there was in it really belonged to England and I ran the car back and told England about this thing. He said, "Run it in the basement and let her stay there." That was done and it stayed there and, when the matter came up, it was fully revealed and told to the trustee and I told them just exactly what had happened, as near as I could remember it and, later, when the books came in and they showed that the books as kept by him showed the distributor's price only on those books, England said to me, after the matter had been gone over thoroughly—

Mr. NEALON.—Now, I object to this hearsay, if your Honor please. We have allowed a great deal of it but I think this is pure hearsay.

The COURT.—No, the question of concealment—I think any conversation between him and England is admissible, as throwing light upon his conduct. [473]

A. England said to me, "I would rather give you a new car, Judge Shute, than to even discuss this

(Testimony of George W. Shute.)

or take any question with the trustee about it." He said: "Mr. Wedepohl kept these books to show the retail—to show the distributor's price and, when you add it all up and run it up, it does not show the cut that way and I had rather give it to you and throw it off than to have anything more to do with it." And just as soon as that was determined and just as soon as that situation was arrived at I told Mr. Nealon, "All right then, the car is yours, and if you want me to, I will pay you the blue book price on it," and I paid him the blue book price and that was all there was to it and then they accuse me of being a crook and perjurer.

Mr. MOORE.—Q. Judge Shute, explain this throw-off or cut. As I understand it, the A. E. England Company is distributor here for the Hudson and Essex cars. In other words he is what you call the wholesaler. Now, is that substantially correct?

A. He is the state distributor. Cars come to him and from him are distributed to agents over the state.

Q. And he sells those cars to the agents at one price and, of course, the agent sells them to the public at another price? A. Yes.

Q. Now, am I correct in assuming that this sum that was to be split between you and England was on some basis that never had been adjusted, consisting of the profit of the dealer would make on a resale, minus the difference between the price that

(Testimony of George W. Shute.)

England would give [474] this car to the dealer and what the dealer would sell it for? A. Yes.

Q. And that was about 20% of the purchase price, was it not?

A. Right around there. I don't know just exactly but that is about what it is. That is my understanding of it. I never have been told directly.

Q. Now, am I correct in understanding that at the time you gave this conditional sales contract there never had been any adjustment between you and England to ascertain how much you should pay him—what profit would have accrued to the dealer if you had bought the car directly from the dealer?

A. There never had been, no. In fact he never sent me a bill. I would pay him at times considerable sums. He never sent me a bill.

Q. Did you ever have a settlement or statement of account with England of the various car transactions?

A. No, I never did. Never was summed up.

Q. State whether or not, when you and England went over the matter of the purchase of this last car and giving the conditional sale, it was agreed between you that approximately $1,500.00 would be the amount that you would owe to England on the final adjustment of this split and all other items?

A. Yes, we concluded, in talking it over, that $1,500.00 would cover it.

Q. Now, Judge Shute, did you execute the conditional sale at the time you purchased the car? I

(Testimony of George W. Shute.)

will show you, to refresh your memory, Creditor's Exhibit 4. That seems to be an original conditional sale executed by [475] A. E. England Motor Cars Company, by E. A. Wedepohl, secretary, and by you and recorded in the office of the County Recorder on the 26th day of November, 1927. Is that the document you referred to?

A. Yes.

Q. Now, you did not file your petition in bankruptcy until— A. April.

Q. April, 1928? A. Yes.

Q. This transaction took place five months before? A. Yes.

Q. But you did give this conditional sales contract to England after demand had been made upon you by Miss Birdsall and you had practically been told that you were going to be sued by Mackay?

A. Yes, that had all been done at that time. I made up my mind that I was going to fight. That was my first inclination and then, after I had discussed it with the members of the firm, I changed my mind about it.

Q. Now, you are getting ahead of your story. Now, prior to the execution of this conditional sales contract, all of the cars that you bought from England were bought on open account, were they not?

A. Yes.

Q. So, when you came to buy this new car, in view of the threatened litigation, you suggested that it be covered by conditional sales and that conditional sales price—I mean the price of this car

(Testimony of George W. Shute.)

being figured at what you and England have figured out—I mean you and England agreed you would probably owe him on a final adjustment of all accounts and including the split of the dealer's profit? [476]

A. Yes. I am not too sure that the other cars were not covered by conditional sales.

Q. The record does not show it. Judge Shute, did you consult with Mr. Lewis as to whether or not you should list that car at the time you prepared your first schedule? A. Yes.

Q. Did you and Mr. Lewis look up the law in regard to listing property covered by a conditional sales?

A. Yes, we looked at Corpus Juris to see about what the situation would be.

Q. I show you Volume 7 of Corpus Juris and refer you to page 124, Section 214, and ask you if that is the section of Corpus Juris that you and Mr. Lewis considered at that time?

A. That is the one.

Mr. MOORE.—Q. May I read it? "Where the contract was one of conditional sale, the reservation of title in the seller until payment for the property is made will prevent the title from passing to the trustee, although the goods were in the possession of the bankrupt, unless, under the state law, such reservation is ineffective as against the creditors of the buyer, because of failure to record or otherwise, or unless the transaction is such that the title

(Testimony of George W. Shute.)

did really pass to the bankrupt, and the reservation of title in the seller is merely colorable."

Q. Did you, on your first examination before the referee, tell about this car and where it was located?

A. Yes.

Q. At the time of your bankruptcy how much did you think you still owed on this car?

A. I was of the impression that it was around a thousand dollars. [477]

Q. And you so testified at your first examination?

A. Yes.

Q. Now, there has been introduced in evidence here a note and chattel mortgage, showing that you borrowed $750.00 from the First National Bank of Arizona on the 7th of April, 1928, and secured that debt by a chattel mortgage on this car. Will you explain that transaction?

A. Yes. When I went down and borrowed the $750.00, for the reason that I was rather insistent upon Mr. Ganz taking a chattel mortgage for anything that might finally show that there was in that car. He did not want to take it at first and I told him that I thought that they ought to have it, in view of the conditions that existed at that time, and he took it finally and that was the reason for the giving of the chattel mortgage.

Q. And that chattel mortgage was recorded?

A. Yes, I understand so. I did not record it.

Mr. MOORE.—Now, may it please the Court, I desire to read into the record the order of the referee which it is alleged the bankrupt has failed

(Testimony of George W. Shute.)

to obey, which is assigned as one of his grounds for not being discharged. This order is dated the 1st day of May, 1928, signed by R. W. Smith, referee in bankruptcy, and I am reading from the original order. "Upon motion of Alice M. Birdsall, attorney for J. J. Mackay, a creditor of said estate, that said bankrupt be required and ordered to amend his schedules heretofore filed in said matter, upon the grounds that the testimony of said bankrupt, given under examination by said attorney, discloses that said schedules are incorrect and untrue. It is ordered by the referee that said bankrupt be and he is hereby [478] required to file new schedules or to so amend said schedules heretofore filed by him to conform to the facts and provisions of the Bankruptcy Act. Dated this 1st day of May, 1928."

Mr. MOORE.—I read the order and now I will read the proceedings at the first examination on that point.

Mr. MOORE.—Page 16 at the middle of the page. "Miss Birdsall: I move that the bankrupt be required to amend his whole schedule to conform to the act. He says that he did not have to schedule all of his debts; it is my understanding that he does." Now, the referee, on page 17, says, "I think it would be better to file and entirely new schedule as this is short; have it include these omissions." And the omission was only this in regard to the Mackay debt and the bank. Now I will ask you, Judge Shute, if you have ever seen a copy

(Testimony of George W. Shute.)

or had knowledge of the order—written order made and filed by the referee, which I read just a while ago, until it was offered for evidence?''

A. I don't believe that I ever saw it, Mr. Moore. [479]

Cross-examination by Mr. NEALON.

Q. Judge Shute, on April 17, 1928, you knew that you owed the First National Bank of Arizona $750.00, did you not? A. Yes.

Q. I call your attention to Schedule A–2 in the Creditor's Exhibit No. 2, being the first schedule you filed, and call your attention to the printed part of that schedule at the top, which says, ''Creditors Holding Securities. N. B. Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Acts of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.'' And I call your attention further that in this Schedule A you have inserted therein the word ''None,'' and signed that schedule at the bottom. That is true, is it not?

A. The schedule so shows.

Q. Then, the schedule was signed by you?

A. Certainly.

Q. And at that time you knew that you owed the First National Bank the sum of $750.00, did you not? A. Yes.

(Testimony of George W. Shute.)

Q. Now, I call your attention to the oath to that schedule. "United States of America, District of Arizona. On this 17th day of April, A. D. 1928 before me personally came George W. Shute, the person mentioned in and who subscribed to the foregoing schedule, and who being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to Bankruptcy." That oath is signed by you? A. Yes.

Q. You knew at the time the terms of the oath when you signed it? [480] A. I thought I did.

Q. You knew that you owed the First National Bank of Arizona the sum of $750.00, secured by a chattel mortgage on an automobile? A. I did.

Q. Which is this Hudson car that has been so much discussed? A. Yes.

Q. Now, after you had been ordered by the referee to file an amended schedule, you filed in Schedule A—I mean you set up in Schedule A this debt to the bank of $750.00, with the full description of the car that was secured thereby?

A. The schedule so shows.

Q. And that particular page is signed by you?

A. Yes.

Q. Now, Judge Shute, had you put the description of the security, together with the existence of this note, in your first schedule filed, it would have disclosed that you had this Hudson car, would it not? A. It would.

(Testimony of George W. Shute.)

Mr. NEALON.—Q. Then, why didn't you put it in?

A. For the reasons that I have heretofore stated.

Q. But, I am calling your attention to the fact that if you had put it in the trustee would have had information in the schedule of an asset that had been omitted from that schedule?

A. Why, certainly.

Q. Is that the only explanation you have to make, Judge Shute, that heretofore already made?

A. I have made the explanation as best I can why it was left out, not with any idea of concealing anything from the trustee. I drove the car around here at that time. It was a matter of public record. I was using it every day. Everybody knew it. Miss Birdsall had no hesitation in referring at once to the car. It was well known and fully disclosed. [481]

Q. Do you know where Miss Birdsall got her information? A. I do not.

Q. If she had not had that information, it would not have appeared anywhere in your schedules or other information?

A. Why, I can't see that. I can't say that, Mr. Nealon.

Q. When did you deliver the car to Mr. England?

A. I am not sure about the date but I think it was just shortly before the filing of this schedule.

Q. Was it before or after you mortgaged the car to the bank?

(Testimony of George W. Shute.)

A. Now, if you will give me the date of the mortgage, I can tell you. I am not sure whether it was before or after. I think it was after. That was the 7th.

Q. As a matter of fact, you testified before the referee that you turned that car back to England, didn't you? A. I did.

Q. Now, you would not have mortgaged it to the bank after turning it back to England, did you?

A. I think probably I might have done that very thing.

Q. You do? A. I might have done that.

Q. And, yet, the testimony that you gave before the referee was that you were turning it back on the conditional sales contract, was it not?

A. Exactly.

Q. And yet, you mortgaged it as your own property to the First National Bank thereafter?

A. I mortgaged whatever interest that I had in it, Mr. Nealon, and it was done with the full intention of protecting them, if there should be anything left when the matter was finally worked out with England.

Q. You were present when Mr. Sylvan Ganz testified at a subsequent meeting of creditors, were you not? [482] A. I was at one.

Q. You made this loan directly from Mr. Sylvan Ganz, did you not? A. I did.

Q. He is the vice-president of that bank, is he not?

A. I believe that is his official position.

(Testimony of George W. Shute.)

Q. And you recall his testimony that nothing was said to him about there being a conditional sales contract upon the property, do you not?

A. I remember it very well.

Q. Was he mistaken about that?

A. Nothing was said?

Q. Yes. A. No, he is not mistaken.

Q. You did not disclose to the bank, when you made that mortgage, the existence of this conditional sales contract to which you referred?

A. To Mr. Ganz?

Q. Yes. A. No, I did not.

Q. Now, you subsequently testified before the referee that you had an interest which you thought amounted to something like a thousand dollars in that car, did you not?

A. I don't believe I testified to that.

Q. You testified that you had some interest in that car, did you not?

A. I stated that I thought that I had paid it down to about a thousand dollars. The car was practically a new car.

Mr. MOORE.—Q. That is, where you would owe a thousand dollars on it, Judge Shute?

A. Yes, I think that is my statement concerning it.

Mr. NEALON.—Q. Didn't you testify after that as to the amount [483] that you considered that you had in that car?

A. Well, if I did, I don't remember it.

(Testimony of George W. Shute.)

Q. Now, Judge Shute, before preparing your schedules, did you or did you not ascertain from the A. E. England Motors Company what amount, if any, was due on that car? A. No, I did not.

Q. Then, how could you have made this oath in regard to the monies that you owed?

A. I just made it as it was, as I told you. I turned the car back. It was turned back for the purpose of protecting that amount. Under the terms of the conditional sales contract, strictly speaking, that car immediately, in my opinion, reverted to England.

Q. Did you relinquish your interest in it?

A. That would be a relinquishment; that very act.

Q. Did you, by any instrument, relinquish your interest in it? A. No.

Q. You claimed an interest in it subsequent to that time, did you not?

A. I think I told you, Mr. Nealon, that Mr. England and I had always been the best of friends; that he was a client of mine; that if, when the matter was all staightened out, I could resume that contract and take care of it, I expected to do that and I expected that he would favor me, if he could.

Q. You knew, at the time that you prepared this schedule, that you did have an interest in that car, which passed by operation of the law to the trustee from the filing of your petition in bankruptcy, did you not? A. No, I did not.

(Testimony of George W. Shute.)

Q. You had looked at the bankruptcy law, had you not, prior to filing your schedules?

A. Mr. Lewis and I talked it over and read the section out of [484] Corpus Juris and determined at that time that the title did not pass to the trustee because of this conditional sales contract.

Q. Are you not aware that any interest that you have, which might be disposed of in any manner, passes to the trustee? A. I am now.

Q. You are now?

A. Yes. I ascertained that very soon after beginning this bitter experience.

Q. I call your attention to Schedule B –4 of your first schedule in bankruptcy, in particular, to the item "Personal Property" and the filling in in answer thereto "None." Did you or did you not have other personal property at that time?

A. May I see that, Mr. Nealon?

Q. Yes.

A. I did not quite catch that question.

Q. This particular thing to which I am calling your attention, now, personal property.

A. I thought, when that was made, that that expressed it truly, Mr. Nealon.

Q. That is not an answer to my question and I move that that be stricken, if your Honor please.

The COURT.—Motion denied.

Mr. NEALON.—Q. Now, will you answer the question that I asked you?

A. I thought I had answered it.

Mr. NEALON.—Q. When you saw this part of

(Testimony of George W. Shute.)

the schedule, did it not suggest to you that you should have placed therein your interest in the Hudson car?

A. No, it did not.

Q. It did not? A. No.

Q. I call your attention to Schedule B -3. The particular part [485] is C, policies of insurance, and the answer that you have given therein, "None." That is correct, is it not? A. Yes.

Q. At that time, you did have this $10,000.00 insurance policy upon your life, did you not?

A. Yes.

Q. You knew you had it at that time?

A. I did.

Q. Why didn't you put it in your schedule?

A. For the reasons that I have heretofore stated.

Q. But, you notice that this a direct question for policies of insurance?

A. We determined that that could not possibly apply to policies that had no loan value, I think.

Q. Judge Shute, shouldn't you have listed that as required by the schedule forms and left the determination of that question—

A. I certainly should.

Mr. MOORE.—Q. Judge Shute, that last answer was based on your experience in this case, isn't it?

A. Exactly.

Mr. NEALON.—Q. Now, you had had this policy in your possession for how long, Judge Shute?

A. From the date of its writing until the date of the schedule.

(Testimony of George W. Shute.)

Q. About how many years was that?

A. I am a little bit hazy about the year that it was written but I think it was in 1924.

Q. Now, you were preparing a schedule of your assets and liabilities in order to be discharged in bankruptcy from the obligation listed in your schedule, were you not? A. Yes.

Q. And you knew that you would have to make an oath both as to your assets and liabilities at that time? [486]

A. I don't quite get that question.

Q. You knew, at the time that you were preparing these schedules, that you would have to make an oath to that, did you not? A. Yes, I did.

Q. Now, this insurance policy was in your office, was it not? A. In the safe.

Q. In the safe in your office and you could have, by examining it, ascertained the loan value from the policy itself, could you not?

A. Yes, very easily.

Q. Did it not occur to you that it was your duty to have examined and seen whether that was an asset or not before you reported none?

A. So sure was I of what the contents of the policy was, based upon the conversation which I had had with Miss Crockett concerning the character of insurance and the kind of insurance that, when Mr. Lewis and I were talking it over, I says, "I know just what is in it, because of the conversations that I have had with Miss Crockett," and all I would have had to have done would have been

(Testimony of George W. Shute.)

to have walked through the rooms and had the safe opened up and opened up the box and have gotten it, Mr. Nealon, and have determined that absolutely. A very foolish thing, I will admit, for me to do.

Q. Now, you have been either a practicing attorney or on the bench for how many years?

A. I was admitted to practice in 1902, I believe.

Q. And, with the exception of the eleven years or so you were on the bench, you have been a practicing attorney all of that time? A. Yes.

Q. The firm of which you are a member and were a member at this time does a considerable business in insurance, does it not—insurance cases? [487] A. You are speaking generally?

Q. Yes. A. Yes, we do.

Q. They also do considerable business in bankruptcy, in the way of having interests of clients to protect in the different bankruptcy proceedings?

A. If there has ever been a case in bankruptcy in our office, except one, which is the one that I mentioned, I don't know it.

Q. You were trustee in bankruptcy in one case, were you not? A. Trustee?

Q. Weren't you? A. Why, no.

Q. Weren't you trustee in that truck company case?

A. Not that I know of. I have no recollection of being trustee.

Q. I have been informed that you were.

A. No.

Q. I may be mistaken. Anyway, Mr. Arm-

(Testimony of George W. Shute.)

strong, the senior member of your firm, is thoroughly posted in bankruptcy matters, is he not?

A. You may ask Mr. Armstrong. I am sure I don't know. Mr. Armstrong is a most excellent lawyer.

Q. I agree with you fully. Didn't you testify earlier that you consulted with older heads in the firm in regard to this matter before going into bankruptcy? A. In regard to what matter?

Q. Bankruptcy.

A. In regard to whether I should go in or not, yes.

Q. You were referring then to Mr. Armstrong?

A. Yes, and to Mr. Moore.

Q. Now, I call your attention to Schedule B.–3, unliquidated claims of every nature, with the estimated value, and ask you why you did not put the Wesley Goswick matter in under that heading, [488] instead of answering with the word "None?"

A. For the simple reason that there never was any.

Q. For the reason that there never was any what?

A. Agreement with Wesley Goswick or any contract or anything else.

Q. Was this arrangement between Packard and Goswick brought about by you before or after this bankruptcy proceeding? A. What do you mean?

Q. Where you brought the two together and arranged a settlement between them?

A. Before. '27, I think it was. August, '27.

(Testimony of George W. Shute.)

Q. But, at that time, one of these men had acknowledged that you were entitled to a payment of 10% of that sum, did he not?

A. In the way that I have related it, Mr. Nealon.

Q. Well, he did acknowledge that?

A. Yes, he did. Rather pressed it in upon me during these conversations that I had with him.

Q. He was claiming to be an equal partner in that deal, was he not, with Mr. Goswick?

A. Yes, so he told me.

Q. So, you had an acknowledgment of that debt from a man who claimed to be an equal partner in that proposition, did you not?

A. As I told you. As I related the circumstances.

Q. You did have that acknowledgment from him?

A. Yes, that statement.

Q. And, you disclosed all of these facts to Mr. Goswick at the time you got from him the settlement in accordance with your suggestions, did you not? A. Oh, I don't think so. I just—

Q. Didn't you testify to that on your direct examination, Judge Shute?

A. I told Mr. Goswick at the time that the basis of the settlement [489] was this and told him just exactly what the basis was but I did not go into the facts of it at all with him. He was perfectly satisfied with it. In fact, his instructions to me, at the time that I talked to him about it, was that anything that I did in the matter was perfectly all right; for me to do it and go and get it settled up for him, if I could, and he would do

(Testimony of George W. Shute.)

anything, deed any part of the property to Packard.

Q. May I call your attention to the fact that Mr. Moore asked you if you disclosed the facts in regard thereto to Mr. Goswick?

A. Whatever I said to Mr. Moore, I will say now, whatever it was.

Q. And didn't that include at that time the deduction of the $70,000.00 which has been heretofore testified to?

A. It certainly did. That was the basis of the settlement.

Q. Now, did you not tell Wesley Goswick at that time how those figures were arrived at?

A. I did.

Q. And, therefore, you told him at that time that Mr. Packard had acknowledged an indebtedness to you in the matter, did you not? A. I did.

Q. And, after your making that statement to Mr. Goswick, he made the settlement in accordance with the proposition made by you in that case?

A. Yes.

Q. At the time that the $5,000.00 payment was made, you were paid the sum of $500.00, one half of the payment being made by Mr. Goswick and the other half by Mr. Packard, were you not?

A. I don't think so.

Q. Then, if Mr. Packard said so, he was mistaken, is that true?

A. I think Mr. Packard was in error, if he says so.

(Testimony of George W. Shute.)

Q. Now, prior to the making of this arrangement between Mr. Packard and Mr. Goswick, you received $1,000.00, did you not? A. No. [490]

Q. Did you not receive $1,000.00 when the $10,000.00 was paid? A. I did not.

Q. Then, Mr. Goswick's statement to that effect is erroneous, is it? A. Yes, it is erroneous.

Q. Did you receive $1,000.00 from him then, Judge Shute?

A. There was $1,000.00 or somewhere in the neighborhood of $1,000.00 that came in during that year but there was none of it ever was—ever came to me for any purpose until after this settlement, for the reasons that I stated on my direct examination yesterday. I stated, when I checked back on my hand-book and statements and go back through the transaction that is of record, it is quite apparent that there was $295.00 came into me from this source. A little later, there was $500.00 came in from this source and, as I testified before the referee, at one time, I remember having a discussion with Goswick about this overlapping; at which time he gave me $500.00, which would make all I can remember of it, unless there is a duplication of this two $500.00 items—of $500.00, a thousand dollars, $200.00, $1295.00. That covers this transaction. Now, there may have been a duplication of this two $500.00 items. I am not prepared to say but we will say, for the sake of this question, that there was not; that they all came in—

(Testimony of George W. Shute.)

Q. Well, didn't you get a thousand dollars in June or thereabouts of 1927? A. No, I did not.

Q. Did you get any during the summer of 1927?

A. That is when this settlement was made, in August of 1927. Then is when whatever came in began to come in after this arrangement was made with Packard and after the settlement was had and not before that. In fact, Goswick was out of the state from the 1st of June until some time in August.

Q. And wasn't that the reason that the payment was not made to [491] you at that time?

A. What payment do you refer to?

Q. I am referring to the payment of a thousand dollars?

A. Absolutely not. Absolutely not.

Q. You recall that Mr. Goswick testified to a payment of a thousand dollars?

A. Mr. Goswick testified to the payment of a thousand dollars, yes.

Q. That was before the settlement, was it not?

A. I don't know what his understanding was about the time but I do know that there was not any money paid or any part of any money until after this settlement with Packard in August of 1927, because, as I stated, he was out of the state and because he asked me to check back on that—when he came through Phoenix, he asked me to check back on that check, which was Mr. Foster's personal check; that they would not credit him with it until it cleared through New York.

(Testimony of George W. Shute.)

Q. And after that time you—or at that time Mr. Goswick said that he was going to remember you?

A. Yes, he did that day when it was all over.

Q. What did you say?

A. I don't know what comment I made to it. Probably the usual comment. We talked about it. We always talked very freely about these things and always the very best of expressions concerning the work that I had done and what I had done for them but, just what I said, I don't know but I do know that it was in my mind, in view of the fact that we had this conversation, in view of the settlement that was made, that that was about what was in his mind.

Q. What did you mean about what was in his mind, Judge Shute?

A. As to what he intended to do for me.

Q. As to the amount, you mean?

A. Yes, that was it. [492]

Q. That was understood, then, that he was to pay you a definite amount?

A. No, no amount was ever mentioned.

Q. No amount was ever mentioned? A. No.

Q. Either at that time or any subsequent time?

A. I don't recall that there was, Judge Nealon.

Q. You would be pretty apt to recall it, if there was such a conversation?

A. That is sort of argumentative. I have told you what I can remember.

Q. Well, you feel pretty sure that there was no

(Testimony of George W. Shute.)

conversation in regard to it, do you, where an amount was mentioned?

A. That is the only one that I can remember where we talked about it, that is, until this year.

Q. Now, let me ask you what you had in mind when you wrote to Mrs. Holmes on November 16, 1927. I quote the last part of the letter. Have you a copy of this, Mr. Moore?

Mr. NEALON.—Q. "I have about $2,000.00 coming to me on December 8 and feel sure it will be in at that time. From this, I will settle that note in full." What $2,000.00 were you referring to?

A. I was referring, without any doubt in the world, to this conversation that I had had with him at the time this settlement was made up.

Q. And, why did you put the amount of $2,000.00 in this letter, if there was no amount mentioned between you at that time?

A. For the simple reason that I have heretofore stated that that was running through this whole settlement.

Q. What was running through the whole settlement?

A. The matter of Packard saying, "You are entitled to 10% of these payments and Henderson is entitled to $50.000.00" and, when that settlement was made with the expression that Mr. Goswick [493] uttered at that time left in my mind the impression that when he received this next payment of $20,000.00 that that was just what he was going to do. That was in my mind.

(Testimony of George W. Shute.)

Q. It was in your mind then that you would get $2,000.00 from him at that time? A. Yes.

Q. That is, on December 8, you expected that to be paid? A. That was the date of the payment.

Q. And that was the date of the payment from Foster—that it was due? A. Yes.

Q. And that is the $2,000.00 in the check deposited by you on December 31?

A. That is the $2,000.00.

Q. Now, I will ask you why you used this particular language, Judge Shute, in this letter, "I have about $2,000.00 coming to me on December 8"? Why did you use that language that it was coming to you on December 8?

A. Well, I have explained it about as nearly as I can, I believe. In fact, I think that where I say "about $2,000.00," there would be in my mind, probably, a reservation that probably that would not be the amount. I am not sure but that is the reason for it.

Q. You do not say that you are expecting a gift, a loan or anything else and that you have that in mind, did you?

A. What; that it was a gift, a loan or anything else?

Q. Yes.

A. Why, yes, I had it in mind that it was a gift or loan or something else.

Q. And, then, would you say in a letter of November 16, that you have about $2,000.00 coming to

(Testimony of George W. Shute.)

you on December 8, if you had only a suggestion of a gift at that time? [494]

A. That is exactly the reason that I put it in there. You do not understand, Mr. Nealon, the relation that exists and has existed between these people and myself over a period of—I will say of twenty years—even longer but very close since 1910.

Q. The mere fact that 10% was paid you at whatever times these payments were made up to last June—up to and including last June is merely a matter of coincidence, then, is it?

A. Is that question asked me for the express purpose of getting me to say that there was paid me at that time and to draw me into saying something that is not true? I have told you that I did not receive anything out of the first payment at all; that I did not receive anything out of the June payment, because there was no payment made in June to Packard or to me and that the only consideration that I received from the June payment came along, as shown by my statements, in little amounts that had come to me not as a payment or as a recognition of a debt or anything of the sort but as a recognition of what I had done for them in the years preceding and for no other purpose.

Q. You will bear in mind the testimony of Mr. Goswick?

A. I bear in mind nobody's testimony but mine.

Q. Now, the $8,000.00 was paid you in June of 1928, was it not? A. Yes.

Q. At the time that the $82,500.00 or the amount

(Testimony of George W. Shute.)

of that payment, less the previous small payments was paid to Mr. Goswick, was it not?

A. I don't understand that question.

Q. There was approximately $80,000.00 paid to Mr. Goswick in June of 1928, was there not, on the same L. E. Foster contract?

A. $82,500.00 was paid to Mr. Goswick, as I understand it, between the 8th day of the preceding December and that day, in the form of royalties and payments, to make up $82,500.00 paid on that day. [495]

Q. And the payment of $8,000.00 was made to you about that time?

A. There was no payment made to me of $8,000.00 on that date.

Q. There was a payment, you mean, made at some other date?

A. No, I don't mean anything of the sort.

Q. You received $8,000.00 from Mr. Goswick, didn't you? A. I did.

Q. When? A. I think it was on the 8th.

Q. As a matter of fact, you were in Globe at the time the $82,500.00 was paid, were you not?

A. I was.

Q. And right at that time you received from Mr. Goswick, if you object to the word "payment," $8,000.00? A. I did.

Q. Was that merely a coincidence?

A. What do you mean merely a coincidence?

Q. That he gave it to you at that particular time?

A. Why, no coincidence at all.

(Testimony of George W. Shute.)

Q. None at all? A. No.

Q. No coincidence between the two payments then? A. No.

Q. Now, on June 15, there was a meeting of creditors which you attended, at which this payment to Goswick of $82,500.00 was freely discussed, was there not, and testified to by you?

A. The record will show how freely it was discussed.

Q. Don't you recollect?

A. No, I don't recollect how freely it was discussed.

Q. You don't recollect that anything was said about it at that meeting at all?

A. I don't remember what was said about it at that meeting at all. I do remember that at some one of the meetings I told you [496] about this sale, about how it happened, told you where the options lay, where you could get the papers, volunteered to give you copies of them, if you wanted them, at one of these meetings. I don't remember what meeting that was.

Q. That will appear in the record?

A. I think so. If it does not, it was one of the discussions that we had about the matter and I think it was in the record, although I am not clear on that.

Q. Now, you did not, on June 15 or at any subsequent time before the Saturday before Thanksgiving of last year, mention to me anything about having received the $8,000.00?

(Testimony of George W. Shute.)

A. I don't think I did.

Q. Why did you mention it to me at that time?

A. When?

Q. The Saturday before Thanksgiving of 1928.

A. Because there came direct to my attention the fact that you and Miss Birdsall were fooling with this option and attempting to show that I had a contract with Goswick for the sale of that property, under which I was to receive 10% of the amount. I went right straight to you with it the moment that I heard it—the moment that it came directly to me and laid the whole matter before you just as fairly and as honestly and as fully as I possibly could.

Q. And that was the first mention made of this $8,000.00?

A. I think so and I asked you too, at that same time, Mr. Nealon, "Now, in view of this situation as I have told it to you, have you any interest in it," and you said, "No, if that is the truth of this situation, we have no interest whatever in it."

Q. You have testified repeatedly that you had no interest in it, have you not?

A. I certainly have.

Q. And, yet, at that time, you had received payments from both [497] Packard and Goswick, had you not?

A. I have not received any payments on any sort of a thing of the kind.

Q. You did receive money from Mr. Packard, did you not, Judge Shute?

(Testimony of George W. Shute.)

A. I have testified to those payments, I think, or receipts or whatever you please to call them, just as fully as I can remember them.

Q. Well, I do not recall whether you stated that you received money from Mr. Packard at these times or not.

A. He and I are at a little variance upon the amounts and the payments or receipts or whatever there were. He came—I have no recollection that anything ever came in to me until after the August settlement from anybody. I do remember that I had a talk with Mr. Goswick about his first payment, in which I told him that they were very uncertain things; that it was only a small matter that had come in to him; to keep his money; that I had not done anything to warrant his giving me anything out of it at all.

Q. Am I to understand that you received no monies from Mr. Packard at all?

A. No, you are not to understand anything of the sort.

Q. Well, then, explain to me what monies, if any, you received from Mr. Packard.

A. I have tried to explain it, Mr. Nealon, by saying that the $5,000.00 payment never came to me from any source, as I remember it, and the reason that I say that is because of this conversation that I have had with Goswick and the first amounts that I can remember that ever came to me that had any connection whatever with this was—came in after the settlement of August of 1927, a part of which

(Testimony of George W. Shute.)

came from Goswick and a part of which came from Packard. Just the proportions or the amounts, I don't remember, but I think there was $295.00 from Packard, if my records are correct, and [498] $500.00, if my records are correct, from Goswick.

Q. We will leave that for the time being. Now, may I ask you why you made the figures when Mr. McBride called on you in November of last year?

A. Why I made the figures? For the simple reason that I made them for you when I explained it for you. That is so that there was a graphic illustration of it. I says, "Here was the amount. Here was the way it was arrived at. Here was the purchase price. Here was what Packard claimed was coming to him. Take it out. And that would make that thing more easy to figure out.

Q. Now, you have received the monies in accordance with those figures which you have before you, whether it be by gift or otherwise, have you not?

A. I have not.

Q. You have not? A. No.

Q. You received the $2,000.00 when the $20,000.00 was paid, have you not? A. Yes.

Q. And you received the $8,000.00 when the payment was made last June, did you not?

A. Permit me to change that last answer. I did not receive the $2,000.00 when it was paid. I received it on the last day of December.

Q. Well, short time—

A. Well, some of these things are rather important. That $2,000.00 was received, as I testified,

(Testimony of George W. Shute.)

through the mail in a letter—in an envelope that contained no letter, on the 31st day of December, 1927. The $8,000.00 was received, I think, on the 8th of June. I am not positive about that date but I think it was on that date, because I think I made the trip over and back at Goswick's request the same day. [499]

Q. Now, let me ask you this; you had rendered valuable service to Mr. Goswick in connection with that particular property prior to the time that this option was entered into with Mr. Foster, did you not? A. Yes.

Q. And that saved him many thousands of dollars, did it not? A. What do you mean by that?

Q. Well, I mean you saved to him many thousand dollars of property?

A. I did not save him anything, no.

Q. Didn't you, in your testimony before the referee, say they were taking the stuff off of there and that he sent for you and you went up there to prevent that being done and that you succeeded in saving valuable machinery from being removed from the property?

A. If you put it in that light, yes. That is the result, probably, of my advice to him at that time as to the moving off of a large quantity of personal property that was there.

Q. You went up and served the notice or had it served?

A. No, I told him to take it down the next morning and to be sitting on the road and just tell them

(Testimony of George W. Shute.)

not to take off any more property. I went on back to the camp on the head of Gordon Canyon.

Q. As a matter of fact, ever since Mr. Goswick located these claims, you have been rendering him valuable services, have you not?

A. I should say I had and for years and years before that.

Q. Long prior to this deal, there was an understanding that you would get 10% whenever that property was sold, wasn't there?

A. There certainly was not.

Q. There was a direct understanding about that in regard to the option to the Ohio people, was there not?

A. Yes, there was, because I did all of the work. I made the [500] deal, carried on all of the negotiations with Mr. Bedford, entertained him in my own house, went over the matter with him in my own house and did every single step incidental to the carrying of that contract into execution.

Q. And those payments were made to you in regard to that contract both by Mr. Goswick and by Mr. Packard half and half equally, were they not?

A. I don't remember whether they were made that way or not. I did get $500.00 out of that first payment, either in part payments from each or all came from Goswick and I am not sure which.

Q. I want to call your attention to the letter that you wrote in February 18, 1926, to Mrs. Holmes, shown in her deposition here. "Referring to the first mortgage on my place, the situation is simply

(Testimony of George W. Shute.)

this, it can be sold at any time for more than enough to pay off the mortgage. On the first of the year, I made a contract for the sale of some mining properties, out of which I will realize, at the end of this year, $4,000.00, over and above all other income that I have. This money should come in without fail, as the contract for the purchase of the property is going along until the people who are taking it have invested some $25,000.00 already and they will be obliged to take it, because of the expenditures thus far made." What were you referring to in that letter to Mrs. Holmes, Judge Shute?

A. Referring to this Stalker and Bedford option.

Q. And you expected to get $4,000.00 out of that?

A. That is so the letter states.

Q. And the letter states truly your expectation, does it not? A. I imagine so.

Q. In the examination of May 29 before the referee, you were asked this question, were you not, "When was this $500.00 payment received from Mr. Goswick?" and you answered, "In December, 1927." That is correct, is it not? [501]

A. You mean that the record shows that?

Q. Yes, that the record shows that.

A. You have read it. I imagine that is true.

Q. You answered that way, did you not?

A. I think so. That is, I am a little bit uncertain about that month. I can't remember that I had that month in mind.

(Testimony of George W. Shute.)

Q. I call your attention to our copy. You may examine the original, if you wish.

A. No, I don't care to, Mr. Nealon. Examine me from your copy.

Q. I call your attention to this, to refresh your memory. When was this $500.00 received? (Handing document to witness.)

A. It seems that I made that statement.

Q. Now, to what $500.00 were you referring at that time?

A. Evidently that was to one of these payments that came in after August of 1927. Now, just when this came in, as I stated, I am not clear to this day. I don't know *or* just what the amounts were or just where they came from. I am not clear.

Q. Now, when that subject was up before the referee and you testified to this $500.00 payment in December, did that not suggest to you the receipt of the $2,000.00 item? A. It did not.

Q. From Wesley Goswick?

A. It did not. That $2,000.00 item, Mr. Nealon, I never could clear up in my own mind until Goswick and I went over the matter and then even he and I had to go back to his wife to check it up, so as to get it straight.

Q. As to the time or the amount, Judge Shute? As to the payment itself—as to the $2,000.00 payment? You mean that the payment of this $2,000.00 had passed completely from your mind?

A. That particular check had passed completely from my mind and, when we began to work with it,

(Testimony of George W. Shute.)

we went through these records and we found this $1900.00 deposit. We found that that must have been a [502] $2,000.00 deposit. The only thing in the world that I could have had anything at all that had any relation to it was this previous conversation that I had had with Goswick. I went to him and talked it over with him and he said, "I don't know whether I sent you any money at all on that payment or not," and we went to his wife and then she called his attention to the fact that when they came back from California in December of '27 that he had mailed me this check from out on the road between here and the camp.

Q. Now, you mean for us to understand that your business transactions were of such size and volume that a $2,000.00 payment to you in December of 1927 would entirely escape your memory in an examination on May 29?

A. Mr. Nealon, you may understand whatever you please. I am telling you what the situation was.

Q. You had made up your income tax return in March following the receipt of this amount, had you not?

A. The income tax return will show when it was made up. I never make them.

Q. And you reported a thousand dollars from Goswick in that income tax return?

A. That was for the preceding year, I think. Not this. At least, it had no relation to this, because it was not reported, which was rather an

(Testimony of George W. Shute.)

astounding thing to me when it was finally discovered.

Q. You did report a thousand dollars, did you not? A. Yes.

Q. And that did not refresh your memory in any way in regard to the $2,000.00?

A. That had no relation to it in the world.

Q. No, I mean it did not refresh your memory in any way when you make up that income tax and swore to it? A. It had not come in. [503]

Q. Why, I call your attention—

A. Oh, you mean for '27?

Q. 1927, yes. A. Yes, that is right.

Q. That did not refresh your memory at all?

A. No, it did not. It was returned as the thousand dollars that had come in through the year, without any reference to this check at all.

Q. Now, did you keep any record of this matter at all?

A. Well, it is reflected, as I say, in the bank statements and bank deposits but in no other way. I kept no book record of it at all. By that, I mean no record of income or outgo at all so as to show just what it was. I did not think it was necessary.

Q. Where did you keep the record of the thousand dollars that you reported?

A. That was purely my memory.

Q. You had no record then of these business transactions whatsoever? A. Only as I stated.

Q. You have just stated, with reference to the

(Testimony of George W. Shute.)

thousand dollars, it was entirely a matter of memory with you? A. Yes.

Q. Now, in reporting your income tax, the only record you have to guide you was your memory; is that right?

A. Yes, that is all I had, that is, all these amounts that might come in from sources that were not from the regular source of my income.

Q. That is, not from your receipts from Armstrong, Lewis & Kramer?

A. Yes. They are not very many and not hard to remember, as a rule, isolated instances.

Q. Now, I am going to ask you, on this same examination of [504] May 29, if you were not asked, immediately succeeding the question to which I have referred, "Have you ever received any other amount from him:" referring to Wesley Goswick, and your answer being, "Only for fees. They would go into the firm." That is correct, is it not?

A. I think so.

Q. The next question asked you, then, was this, "So this $500.00 was not fees," and you answered, "No." That is correct, is it not? A. Yes.

Q. And yet you reported a thousand dollars in your income tax returns? A. Yes.

Q. Now, how do you account for your answer to the question, "Have you ever received any other amounts from him"—your answer to that question, "Only for fees. They would go into the firm?"

A. Do you mean the discrepancy between the two, Mr. Nealon?

(Testimony of George W. Shute.)

Q. I mean, why did you answer that you had only received this amount of $500.00 from him?

A. I thought I was answering it truly. I was trying to make an accounting of anything that might be necessary to you and was trying to show from my memory, without reference to any book or anything of the sort, the different amounts, so that you might realize anything that was to be realized from it.

Q. Judge Shute, you knew that you were called before the referee for the purpose of examination as to your resources and liabilities and the disposition of your assets, did you not?

A. Yes, I did.

Q. Now, on May 1, you had been notified to come back—or May 22? That is correct, is it not?

A. Yes.

Q. And, on May 22, it was inconvenient for you to be there and, [505] for your accommodation, the matter was put over until the 29th?

A. Whatever the record shows.

Q. Now, did you make any preparation to correctly answer the questions that might be asked you in regard to your receipts?

A. That might be asked me?

Q. Yes.

A. I had no idea of what you would ask me, Mr. Nealon.

Q. Didn't it occur to you that the counsel for the creditor and the trustee would ask you in regard to the sources of your income?

A. Exactly. I made rather a gross mistake, probably. I won't put it—with the idea that the

(Testimony of George W. Shute.)

trustee was going to be as much my trustee as he was going to be a trustee of the creditor. That was my idea of it in the beginning. When the matter came up, I turned over all of my checks, all of my stubs, all of my bank statements, which reflected, I think, almost every transaction that had happened from 1924 on down. Probably even before that. I am not clear about the amounts. I did not even go over those stubs and statements to determine about these things. I handed them over in volume, so that they might just go for any examination. I had no fear at that time at all of what the result might be. I did not make any copies of them. They went in to the trustee or to the referee or wherever they went and were used after that for the purposes of these examinations and I knew that those bank-books and bank statements and checks would contain a key to everything that I had done from there going on down, with but few exceptions.

Q. And, those few exceptions, were you prepared to testify to them?

A. I testified to them as fully as I could.

Q. Had you made preparation for testifying to them—investigation of the facts?

A. I don't—in fact, there was no preparation to be made except to just remember about them, that is all. [506]

Q. Now, you speak of a key that will reflect everything in regard to these matters. Please explain just exactly what you mean by the key.

A. By that, I mean that where I am working, as I am working, and receiving dividends, as I do receive them, from Armstrong, Lewis & Kramer,

(Testimony of George W. Shute.)

where they are kept close track of all of the time and I have no other source of income—regular income, that if, in my bank deposits and my bank statements, there suddenly looms up an item of $295.00 or for $500.00, I know at once that that is an amount that is coming from some source that is not from Armstrong, Lewis & Kramer. I knew that when I handed over these books and records and papers. I knew that those things were in there. That is what I mean by a key.

Q. You made no record or statement up to guide your trustee in that matter?

A. The trustee was, apparently, kind enough never to ask me, notwithstanding the fact that I have volunteered time and time and time again to go over them with you, if you wanted me to do it.

Q. Yes. Now, you were given full opportunities in the courtroom to do that, were you not?

A. I was not.

Q. Now, Judge Shute, in regard to this savings account, you discovered, in your examinations subsequent to bankruptcy, that a good part of that account was made up from checks paid by you into that account of funds that you received from Armstrong, Lewis & Kramer, did you not?

A. Many of them were made up from that source.

Q. Can you tell us the approximate amount of those now? A. I cannot.

Q. You were asked about those particular checks at the examinations, were you not?

A. I don't remember. [507]

Q. You don't remember. You don't recall that

(Testimony of George W. Shute.)

you were asked and you could not trace the funds—checks payable to cash?

A. I don't remember that I was examined, except the most general way, about that. I do know that Mr. Ganz was examined about them and, from the bank records, checked them back, to show that they probably went in a certain place.

Q. Don't you remember that you were asked particularly about a check of January 4, 1927—28?

A. I haven't it in mind right now.

Q. Don't you recall that you were examined about quite a number of those checks?

A. I might have been, Mr. Nealon. If you have the testimony there—

Q. Pardon me. I had not finished my question. Don't you recall now that you were examined about quite a number of those checks and you could not give us the information about them; that they were drawn to cash and that this was prior to the examination of Sylvan Ganz?

A. That may be true. It would be rather hard for me to do, I know, in view of the fact that I had not checked back clean through the records and so on and to follow these things through to a determination of their ultimate source—of their ultimate destination.

Q. There was nothing on the check stubs furnished me or the checks themselves that would show that they were paid into that account, was there?

A. No, I think not. Many of them were paid by payments to the First National Bank—payments to cash. On the check, that is all that would reveal.

Q. Now, those amounts alone exceeded the

(Testimony of George W. Shute.)

amount that was on deposit in that savings account of Jessie M. Shute on April 17, 1928? [508]

A. Well, I can't answer that. The account will show that very clearly. I imagine that that would be true, though.

Q. There were two $500.00 checks, were there not?

A. Well, there may have been. I can't remember the checks.

Q. Now, we did procure that information or a part of it, in your presence, when Mr. Sylvan Ganz was on the stand, did we not?

A. You mean he testified to those things?

Q. Yes. A. Yes.

Q. He showed at what window these checks passed and, in that manner, identified them?

A. Yes.

Q. And, you afterwards, either personally or through Mr. Lewis, had that checked up and found that his testimony was correct in that regard, did you not? A. I think Mr. Lewis did it for me.

Q. Now, at that time, as soon as that was disclosed, and at that meeting, I notified you, did I not, that that, in my opinion, was community property?

A. Oh, you always claimed that it was, Mr. Nealon, at all times. There wasn't any doubt about it.

Q. There was never any doubt about it prior to that time?

A. It appears that the very first time that that was mentioned that your position was that it was community.

Q. That was at the end of that examination?

(Testimony of George W. Shute.)

A. I don't know whether it was at the end or beginning or the middle. That was always done. There never was any other position upon your part.

Q. Now, that developed at the meeting of June 15, did it not?

A. I don't remember the date of the meeting. I don't remember when Mr. Ganz was there.

Q. I will call your attention to the transcript, showing that [509] Mr. Sylvan Ganz was a witness at the meeting of June—

A. I knew it was and, if that is the date, that is satisfactory.

Q. That was the only meeting at which Mr. Ganz was present?

A. I only remember being present at one time when Mr. Ganz testified.

Q. Now, on this matter, I stated to you at that time, "Now, this savings account, I think it is all community property," and you replied, "None of it is community property." Do you recall that?

A. I don't recall it but, if that is what the record shows, why, that is true, I assume.

Q. Now, I will ask you this, if I did not say, "I think there is no question about it. We will make an issue of it"; and if you did not then say, "Well, I would like to tell the referee about that savings account, so he will understand it. I think you can readily see, from this examination, as well as from the accounts, that in the handling of money and the way I accommodate people, I am not a very good business man. Mrs. Shute long ago recognized that. When I came down here, I did not have a thing. I did not have even a decent suit of clothes

(Testimony of George W. Shute.)

and was in debt about $3,000.00 to one institution. She has always done her own work, except for a very short time, had had no one to help her at all. She began to insist upon setting aside a certain sum of money. I gave her money for the house and the rest I have used in expenses. Out of that money, she saved and extracted from me in various ways enough to get this account started. It was put in her name and the understanding between us was that it was her own and belonged to her exclusively. At one time, I took $100.00 to cover the overdraft. She did not know it for a while but, when she did, it made a row. Well, I put that back. She saved it in little amounts and, when payments came in from this house, sometimes I would use them and sometimes I would deposit them in her savings account." That is [510] the statement you made?

A. I think I remember that that is fairly accurate.

Q. Now, as a matter of fact, those savings were made up from some saved by her from your earnings since marriage, leaving aside all question of the Globe property, now, were they not—Globe residence, I mean?

A. Yes, that is, directly and indirectly, Mr. Nealon.

Q. Now, pardon me, I forgot that you mentioned the piano. You can make that exception.

A. There are exceptions of that kind like the piano and, I think, as I stated once before, that there was a little sale of one or two little blocks of

(Testimony of George W. Shute.)

stock that probably went into that account. I can't say.

Q. Were those stocks anything that she had before marriage to you?

A. No, they came after, just as the piano came after and the piano was community, as well as the little blocks of stock that she had sold.

Q. So the source of that entire account was community property, with the exception of what may have been placed in there from the Globe property, is that right? A. No.

Q. That is your contention of it, is it not?

A. Oh, no, I don't make that contention.

Q. Well, explain that. I want to get your version.

A. Well, as I explained heretofore, the savings account was started for the reason that I have explained and it was always Mrs. Shute's separate account, not mine.

Q. Oh, pardon me. I wanted to get at the source of it only. A. Yes.

Q. I want your contention.

A. Yes, I will very freely admit that, except for the rents, in [511] all probability, although I don't say this positively as to the little blocks of stock that were sold, the source of that savings account came originally from my own earnings after marriage.

Q. Now, you stated, I believe, that you had a consultation with Mr. Clifton Matthews about this savings account?

A. Yes, I talked to him at the time that I went to see him about representing Mrs. Shute.

(Testimony of George W. Shute.)

Q. When was that, Judge Shute?

A. Right away after this first meeting. Just when that date was, I don't know.

Q. You mean the meeting of May 1, 29, or June 15?

A. Well, Mr. Nealon, I can't say. Those dates are so closely correlated in my mind but it was right along about that time.

Q. It was after the time this statement just read into the record was made?

A. I can't say that, Mr. Nealon.

Q. Wasn't it at the meeting of May 29 that you first revealed that she has a little savings account or about a thousand dollars?

A. Oh, I think that I testified to that at the first meeting. At least, at the first time I was asked about it, I told about it—the first time that it came up.

Q. I call your attention to the next question, as it may refresh your memory. "Where is that?" And your answer, "In the First National Bank." Then, you go along, "She owns her personal savings and the house at Globe and a few things I have given here." Wasn't that the first time that the subject came up, May 29?

A. It may have been. Whatever the record shows. I can't say.

Q. Now, does that help you in any way to fix the time that you called on Mr. Matthews?

A. No, it does not. I know that it was done very soon after this first question relative to her rights was mentioned. As soon as I could conveniently do it, in other words. [512]

(Testimony of George W. Shute.)

Q. Can you fix it by the date of the withdrawal of $1,000.00 from that account subsequent to your bankruptcy? A. Only that it was before.

Q. It was before that date? A. Yes.

Q. Approximately how long before that date?

A. I can't state. Some days, at least, and probably some little time, because I had gone over to see Mr. Matthews or had seen him on one of my trips over there and had spoken to him and asked him if he could represent her, had gone over the matter with Mr. Matthews, had come back to Phoenix and had advised Mrs. Shute. After she had telephoned over to him and some week or ten days after that, may be more—these times are only approximate—not even approximate but indicative—she went over herself to see him and receive her instructions from him in person.

Q. That was after your consultation?

A. After my consultation.

Q. Now, when Mr. Matthews gave you the advice about this account, will you state briefly the facts that you put before him at that time?

A. Well, as I remember it—

Q. State them a little slowly, Judge, please, so that I can make a note of them.

A. As I went over it with Mr. Matthews, I think that I told Mr. Matthews about it about as I have stated it here; that part of this money had come in from the house; part of it had come in from little sales of stock and part of it had been given by me in pursuance of the understanding which we had had about the return to her of the property that had

(Testimony of George W. Shute.)

been used at Prescott. I think that is about, in a general way, the extent of it.

Q. Now, did you consult Mr. Matthews as your own lawyer? A. No, not at all. [513]

Q. Then, this advice or whatever opinion he gave was not for the purpose of guiding you in the bankruptcy affairs in any way, was it?

A. It would be rather difficult to separate advice coming to me for her benefit which naturally redounded or was against either one or the other possibility. That would be an impossibility. What he told me was told me because of my conversation with him and I took it for what it was worth. What he told her, when she went there, all I know is what she told me.

Q. Now, he was not your attorney at that time?

A. No, Mr. Matthews was not.

Q. Now, state, as briefly as you can and get your facts in, just what Mr. Matthews' advice was or opinion was in regard to this savings account.

A. Well, I think Mr. Matthews stated to me the first time, "There may be some little doubt about this savings account. However that may be, upon the statement you have given to me, there is no doubt but what every interest that you had in it passed to Mrs. Shute. Now, it may be that they will cite Mrs. Shute to show cause or something of the sort why this savings account should not be subjected to the action of the trustee and, when they do cite Mrs. Shute, I will be very glad to be there and make such representation for her as I think is proper and will protect her in any way that I think

(Testimony of George W. Shute.)

she ought to be protected." That is about the extent of it to me.

Q. I am only asking you for the opinion that Mr. Matthews gave you so far as the same affected yourself? A. Well—

Q. And your future conduct in the bankruptcy proceedings. Now, I would like to have that opinion. You have introduced this, Judge Shute, remember, not I.

A. I am not arguing the matter with you at all, sir. I am [514] stating as nearly as I can what the facts are.

Q. Well, give me the opinion.

A. I have told you about what he said.

Q. Well, give me the opinion.

A. That is about what he said to me.

Q. That was all of the opinion?

A. I think that is about what he said.

Q. Then, he did not advise you that that property did not pass to the trustee?

A. Why, it necessarily followed that it did not. It necessarily followed that it did not.

Q. Are you giving now Mr. Matthews' opinion or your own?

A. Well, I am mixing it a little. I don't know but, at least, that is the impression that I had and always did have, which coincided exactly with mine about it.

Q. Mr. Moore asked you, on the direct examination, if you made a statement of the facts to Mr. Matthews and got his opinion on it. As I under-

(Testimony of George W. Shute.)

stood that, that was to be introduced in evidence, showing that the action you had taken in the bankruptcy regarding that account subsequent to that time was based upon Mr. Matthews' advice to you. Was that a fact?

A. Why, no, I don't think that you have that right, Mr. Nealon, if I get your question right. As I told you, as soon as the question of Mrs. Shute's property came up and her legal rights under it arose, I immediately notified her that she ought to have separate counsel in the matter and, in pursuance of that conversation which I had with her, when I told her about it, nervous and excitable woman that she is, I told her or she asked me who I thought she ought to have, with the result—

Q. I don't care to go into that phase of it. I only want to go into it so far as it is pertinent to your defense that you acted upon the advice of Mr. Matthews in regard to withholding property [515] from the trustee.

A. I never have stated at no time that I ever acted upon the advice of Mr. Matthews. I simply said that Mr. Matthews' advice and talk with me convinced me that I was right about it and the subsequent conversation which he had with Mrs. Shute and her statement to me simply reaffirmed it, that is all.

Q. Now, you have stated all of the facts, then, that you put before Mr. Matthews in regard to the savings account?

(Testimony of George W. Shute.)

A. Oh, there may be other facts, Mr. Nealon. I can't remember just what that story was that I told him. I talked at quite at length to Mr. Matthews. I think that I was there from about 4:00 o'clock until after 5:00, which necessitated quite a conversation.

Q. Did you tell him that you were insolvent at all of the periods involved in that savings account?

A. We discussed that very feature of it. We went over that and talked about the amounts and so on.

Q. And did he tell you that the trustee had no interest in that account after that statement to him?

A. I think he stated to me just about as I have told you.

Q. Now, I don't mean that you told on direct examination. Go ahead with anything that you want to say. A. That is all I want to say.

Q. If I understood you correctly, in answer to the question that Mr. Moore put to you yesterday, in regard to the Essex car, you said that he told you that the gift was good as between you and your wife but that the trustee in bankruptcy might assert a title superior to hers in that?

A. No, he did not tell me that. I did not so testify.

Q. All right, now, just what did he tell you in regard to the savings account on that same subject?

A. He told me that before they could be touched at all that her [516] rights must be determined

(Testimony of George W. Shute.)

in it and that her rights could not be determined without a proper citation and without it being properly determined.

Q. Yes, we will agree that that is good advice. Now, what did he advise you in regard to your duty in scheduling that property?

A. I never consulted with Mr. Matthews about that.

Q. Then, he gave you no advice regarding the bankruptcy proceedings at all?

A. If he did, it was only incidental to the purpose of my visit to him. He recognized that I was represented by someone else and his whole duty was to Mrs. Shute and not to me.

Q. Can you tell how much you placed in Mrs. Shute's savings account between December, 1927, and April 17, 1928, from funds earned by you?

A. Not offhand, I cannot, Mr. Nealon.

Q. Can you from the statement of the bank?

A. If the bank account is here, why, of course, it will show the deposits, whatever they may be.

Q. Well, during that period, within four months prior to the filing of your schedules in bankruptcy, did you deposit any sums in the savings account of Jessie M. Shute? A. I believe there was, yes.

Q. Can you give the approximate amount?

A. No, I cannot offhand.

Q. Wasn't there one check, in January of 1928, of $500.00?

A. I really don't remember, Mr. Nealon. The

(Testimony of George W. Shute.)

savings account shows those deposits. We have them.

Q. Well, do you mean that all of those larger deposits, now, in that savings account were deposits made by you from your earnings?

A. I believe they were.

Q. Now, you gave a check to the A. E. England Motors Company of [517] $995.00 for V. L. Wentworth, did you not?

A. I believe the record so shows.

Q. That money, you claim, was repaid to you in certain sums, do you not?

A. It either was given to me before or after to make up the purchase price of this car.

Q. Can you now state to the Court what was done with this money after you received it?

A. Well, I probably retained it. In fact, that must have been what was done with it.

Q. And retained it in what form, Judge Shute?

A. I am sure I don't know. In whatever form that I might have retained it. There might have been a sum of money come in to me for the purpose of paying on that car and I did not pay it right at that time. I may have used a part of that money for incidental expenses and, then, later, when the amount was ready to be paid, it was paid in one lump sum by me.

Q. Now, that money does not appear in any of the bank statements, does it not—the money that you received, or does it?

(Testimony of George W. Shute.)

A. I do not believe that it does.

Q. Now, I will ask you to account to the Court at this time for that money. Make the best accounting you can of it now.

A. What do you mean by that?

Q. What became of the money?

A. Went to pay this $995.00.

Q. But that was paid from your personal checking account, Judge Shute.

A. It would be utterly impossible for me to account for just how that money was handled and how it was spread out. As it came in, the last amount was this $150.00 that was received for the little car. That was $150.00 of it. The other amounts were spread over three or four payments—maybe more. I don't remember [518] exactly what I did with that money, how it went. I could not say without, probably, an examination. It would be utterly impossible for me to account for it. I don't know.

Q. So your answer is that you cannot account for that money in any way, is that right?

A. Well, I won't say that. I assume that I could trace it around and find where the whole sum went. I am not prepared to say.

Q. I am calling your attention now to your examination of May 29 on that subject. I call your attention first to the question, "Then I notice check number 548 here, dated December 3, 1927, for $995.00. On what was that applied?" And your

(Testimony of George W. Shute.)

answer, "That calls for a little explanation. He, referring to Mr. England, has been throwing off a little percentage on the list price of cars to me. The Wentworths in Globe wanted a new car and, in talking to them, I told them about this percentage and they asked me if I could not get them the throw-off on the car they intended to purchase. I talked to England about it and he said he would do it for me. They bought a new Hudson car and Mrs. Wentworth gave me $400.00 and later $900.00, completing the total purchase price of the car."

A. I believe that is right.

Q. That is the way you explain it. Now, the next question. "Then, this $995.00, you received from the Wentworths. Yes. In other words, there is about $1300.00 cash payments that do not belong in my checks there at all. It was money they advanced to me to complete the transaction for the car." That is correct, is it not?

A. I believe I testified to that.

Q. "When was this car bought for Miss Wentworth? I think it was in December." That is correct? A. Yes.

Q. You were referring then to December of 1927? [519] A. Yes.

Q. Then, you were asked the question, "When did they give you the payment of $400.00?" And you answered, "A little before the $900.00 payment was made by me. The check will show the dates exactly." That is correct, is it? A. I think so.

(Testimony of George W. Shute.)

Q. Then, you were asked the question, "The check for $900.00 is dated December 3, 1927. A. The one before that was the last payment." That is correct, is it not?

A. That is correct, if you are reading from the record. I just don't get that exactly.

Mr. NEALON.—Will you give the original record to the witness, so that he can testify.

A. Just tell me that that is what it is. You don't need to waste any time on whether it is an original or a copy.

Q. That is a copy and I am reading from the record. A. I will take your word for that.

Q. Then, you were asked this question, "I don't find any $400.00 check to Me. England, that is, in the latter part of 1927. There was one on September 2 for $250.00 and one on November 25 and then one on December 3 for $995.00." And you answered, "Well, the two checks paid for the little Essex. I am not sure that the $400.00 was paid. I don't know whether I turned over the $400.00 check to them or whether I deposited it and then paid it. I am sure of the $900.00, because that amount came in cash. I deposited it in cash and checked it out." Now, I will ask you which is the correct statement, the one made at that time that you deposited it in cash and checked it out or the one you have made just now?

A. It is quite apparent that I did deposit it in cash, Mr. Nealon, and checked it out. It is quite

(Testimony of George W. Shute.)

apparent that the payments were made in cash to me that I never deposited.

Q. Now, where is it apparent from? What shows that they were [520] paid to you in cash?

A. Because they were made to England by me and the bank account does not show that I ever deposited them.

Mr. MOORE.—May it please the Court, are we going to review all of the testimony taken? As I understand it, he is directing his testimony to this $995.00, which he alleges is the amount the bankrupt paid during the month of December, 1927, to A. E. England by check on the First National Bank as payment on a car for one Virginia L. Wentworth. Now, let's stop there. There is no use to go any further. Just assume December, 1927, Judge Shute gave A. E. England $995.00 to apply on a car, which we will assume he wanted to give to Miss Wentworth. Now, what difference does it make? The money is gone. $995.00 is gone. Whether Miss Wentworth gave the $995.00, it makes no difference if he paid it from his own funds and presented this car to Miss Wentworth in December, 1927, as a present.

Mr. NEALON.—There is no allegation in regard to that.

Mr. MOORE.—Can you say he has concealed that?

Mr. NEALON.—There is no allegation in regard to that.

The COURT.—What he is charged with is concealing.

Mr. NEALON.—The money that he received from her, not the money that he paid.

Mr. MOORE.—Now, wait a minute.

The COURT.—At what time?

Miss BIRDSALL.—December, 1927.

The COURT.—When was the petition filed?

Mr. NEALON.—April, 1928. We are asking for an accounting for that $995.00 that he got from Miss Wentworth.

Mr. MOORE.—That is not an accounting.

Mr. NEALON.—Disposition of the other money that he has testified to that he paid to England for the car. Now, we want an accounting of the money that he got from Miss Wentworth. [521]

Mr. MOORE.—Now, wait a minute. Now, then, this reads: "995.00 being the amount which said bankrupt paid during the month of December, 1927, to A. E. England by check on the First National Bank of Arizona, signed by G. W. Shute, bankrupt, as a payment on a car for one Virginia L. Wentworth, of Globe, Arizona, which payment said bankrupt testified under oath, at the first meeting of his creditors, on the 29th day of May, 1928, was made by him for said Virginia L. Wentworth in December, 1927, out of monies paid to him by said Virginia L. Wentworth, but which money so paid to him by said Virginia L. Wentworth did not appear in any statement or data furnished to said trustee by the bankrupt and has never been accounted for."

(Testimony of George W. Shute.)

Why, the allegation answers itself, your Honor. They are asking him to account for $995.00 that he paid England as a payment on a car, which $995.00 was made up by funds paid to him by Miss Wentworth.

The COURT.—What their position is is that the money paid by Wentworth was not put into the banking account and no accounting made for it and that this car was paid for out of the funds of the bankrupt by a check on the bank.

Mr. NEALON.—Yes. The questioning was done under another assignment in here, wherein we directly allege, "but which money so paid by said Virginia L. Wentworth did not appear in any—" Practically the same thing.

The COURT.—The witness has stated that this money was paid to him in cash and that it went in the usual course of business in the payment of bills. Now, why pursue that further?

Mr. NEALON.—But he has stated, in a previous examination, a different disposition of the money.

The COURT.—Well, he tells us that that must have been incorrect.

Mr. NEALON.—We just want to test out which is the truth.

The COURT.—You are taking too much time. We can spend the whole day, perhaps, trying to trace that $900.00 that was paid to [522] him and in ascertaining what disposition he made of it.

Mr. NEALON.—This was the first admission,

(Testimony of George W. Shute.)

prior to the filing of these specifications, that the money did not go into the bank.

The COURT.—If you intend to pursue this examination as you have been doing and then take up those separate specifications, why, the Lord help us, I don't know when we will get through.

Mr. NEALON.—I don't want to work any more than anyone else that is in here.

The COURT.—In other words, I don't want the examination to overlap.

Mr. NEALON.—Nor do I wish it to, if your Honor please. If I do so, it will be inadvertent, I assure you. There will be some cases where in necessity they will overlap to some extent.

The COURT.—Then, I may shorten it.

Mr. NEALON.—Q. You heretofore explained that this $995.00 went into the $1900.00 deposit, which you have since explained is the $2,000.00 check from Goswick less $100.00? Is that true?

A. That is one of the things that I explained to you yesterday. That is true.

Q. I did not examine you yesterday, Judge, did I?

A. Well, I should not have said to you. Pardon me. That, I explained yesterday.

Q. That was a volunteer statement on your part about that $995.00 having gone into that account? You were explaining that deposit at the time, I mean?

A. I was trying to make it up without having examined any of the data or without having examined any of the checks or any of the things that

(Testimony of George W. Shute.)

should have shown about where it was and where it went and so on.

Q. Now, in regard to the Essex car, I assume the same statement was made to Mr. Matthews in regard to that car as was made about the other property or was it different in a way? It must [523] have been different to some extent. Explain the difference.

A. Well, I don't know just what you mean by that. I had rather have you ask me.

Q. You explained to him that it was a gift?

A. Yes, I did.

Q. And you explained to him that you were insolvent at the time the gift was made?

A. I so stated.

Q. Well, I am asking you to state it to me in this examination—state it to the Court, rather. Now, what opinion did he give you as to the car then?

A. The same opinion covered it all. Same statements to me covered it all.

Q. It was that the gift was good as between you and your wife? A. Yes.

Q. Did he state that it was not good as between you and a creditor that had a debt existing at the time the gift was made?

A. He did not. He, as I stated, always said that her rights and whatever showing that she might have to make relative to her rights or her interest in that property could not be determined without a hearing and that she must necessarily be made a party before it could be finally covered, because—

(Testimony of George W. Shute.)

Q. And that was a defense for her?

A. Interposing any defense that she had to any question that might arise relative to that property.

Q. Did he tell you that the property in that car, the gift being void, passed to the trustee in bankruptcy by operation of law on the filing of your schedules?

A. He never said that it was void. He never said that it passed to the trustee.

Q. Was that matter taken up with him?

A. It may have arisen incidentally during the course of the [524] conversation.

Q. In any event, you were not relying on any advice that you got from him in regard to your bankruptcy proceedings; is that right?

The COURT.—Well, he has answered that, now, just as fully as it is possible, it seems to me. He said he could not separate the advice that he gave with reference to what Mrs. Shute claims from his own conduct in the proceedings—he could not tell to what extent he was influenced one way or another. It seems to me there is no use of repeating it.

Mr. NEALON.—Q. This phonograph that has been the subject of questioning here, you bought that from Berryhill, did you not?

A. Yes.

Q. Conditional sales contract? A. No.

Q. Straight account? A. Open account.

Q. How much was due on it at the date of bankruptcy, if you know?

(Testimony of George W. Shute.)

A. I am not sure but it seems to me it was fifty or a hundred dollars but I am not—

Q. The purchase price of the automobile was how much—of the phonograph?

A. I am not sure whether it was $365.00 or $385.00. I checked it up after this examination to find out and even now I have forgotten whether it was 365 or 385.

Q. You are living at the same place that you lived at, are you? A. At what time?

Q. At the time that you filed your petition in bankruptcy. A. Yes.

Q. That is on Lynwood Street?

A. 66 West Lynwood. [525]

Q. It has been your home at all times since that time? A. Yes.

Q. That is entirely omitted from your schedules?

A. Yes.

Q. Judge Shute, on December 27, 1928, you testified to a receipt of some money from C. C. Julian that you had not previously said anything about; is that true? A. You mean the story of the—

Q. Yes, of the C. C. Julian.

A. —of the source?

Q. And the $10,000.00. Source of that, yes.

A. Yes.

Q. Now, Judge, you had never before testified to any receipt of any money from Julian?

A. I had not been asked any source.

Q. You had been asked, however, if you had received any money from any other source other

(Testimony of George W. Shute.)

than the firm and you had answered, no, didn't you?

A. There was an examination of that sort, yes.

Q. How would we have known, from any schedules or anything or any documents of any kind that you had turned over, that you had received this money from Julian?

A. By the very simple expedition of checking up on the checks that were there, which would have shown this deposit without any source in the world and have asked me about it and the whole story would have been told to you instantly.

Q. In other words, the only way would be by word of mouth; is that the idea?

A. Yes, that is the only way I could have told you the story about the source of it or only way that it could have come—the only record that could have been made of it.

Q. Now, you only deposited $3400.00; is that correct? [526]

A. I think, as it has been worked out, the records will show that $3400.00 of that was deposited in my own checking account—$1500.00 in the savings—$500 in the savings account. That makes $3900.00.

Q. Now, you received this money, the sum of $10,000.00, in currency, when you received it?

A. It was paid to me in cash, yes.

Q. Now, you say that you paid Joe Bandauer $5,000.00 out of that ten?

A. It was split right in two with him at that time.

(Testimony of George W. Shute.)

Q. Then, you did not deposit the balance in the bank at that time, did you?

A. You mean the rest of it?

Q. Yes. A. No, I did not.

Q. Then, will you explain how, from any bank account, we could have ascertained the source of that? You haven't anything in the bank account itself that would show that, have you?

A. The source of it—where it came from?

Q. Yes.

A. No, the story would not possibly be in any book of record or anything else. Now, you have asked me why in a way— You have insinuated that the difference between the $3400.00 that shows in the bank-books and the rest of it—where it went to—I have concealed it. Do you want to know where it went?

Q. You have already testified and I am not questioning that at all.

A. I would be very glad to tell you.

Mr. MOORE.—Tell your story, Judge Shute, that you have on your mind.

A. Let him ask me and I will tell him where it went, if he wants it and, if he does not, it is all right. [527]

The COURT.—Well, I should like to know, myself.

A. Right at this time and for some time preceding that, my father was in a very low condition. He had had some business reverses, which I always will think were the means of his finally being put

(Testimony of George W. Shute.)

down. They needed the money. I went over there and I gave my mother $1,000.00 of that money, in cash. I didn't take any check or anything else. It came in right then and right out. I went over and gave it to my mother and my father to help them out of their difficulties. In the time succeeding that, during a stated interval of some month or six weeks preceding his death and the death, in the two little things, I used a considerable amount of money for them, in an effort to help them out in that situation. That is what went with the balance of that money and more, too.

Mr. NEALON.—Q. Now, Judge Shute, you testified at the first meeting of creditors that you had made no payments, except by the work you have done for him. You were referring to Mr. England and the Hudson car, were you not?

A. I don't remember just how that came up.

Q. And, the answer, you have had read to you. "That is about the way it would figure out. I don't think I made any cash payments at all."

A. That is about the way I testified at that time.

Q. Now, when you received a check for $5,850.00 from Armstrong, Lewis & Kramer about June of 1927, you did not deposit that check in the bank, did you? A. No.

Q. You took, in place thereof, two cashier's checks, did you not?

A. I took either one or more cashier's checks. I don't remember whether it was one or two.

(Testimony of George W. Shute.)

Q. Well, perhaps I can refresh your memory by other questions. [528] One of those checks was for $2,000.00 and you deposited it or paid it—I am not binding you down to which—with the A. E. England Motors Company shortly after you received the same?

A. I think it was cashed there; yes.

Q. Cashed there?

A. Cashed there. That is, I mean by that I turned it in at that time. It went through the A. E. England Motor people and then back to the bank. I think that is the way that was done.

Q. As a matter of fact, it was paid on your account, was it not?

A. I paid an account there at that time and I paid in on this account and then they gave me their check back for the difference between the two, if I remember it correctly.

Q. That was a check for some seven hundred and odd dollars? A. I believe so.

Q. And you deposited three hundred and some odd dollars of the check you received back with the bank?

A. I don't remember the exact amount of the deposits. The account will show that.

Q. Four hundred odd dollars?

A. Whatever it was.

Q. Now, you received another check for twenty-nine hundred and some odd dollars—a cashier's check, in exchange for the $5,850.00, did you not?

A. I don't remember the amount.

(Testimony of George W. Shute.)

Q. Something about that amount?

A. I don't remember the amounts. Whatever they are.

Q. The balance between the amount you received and $2,000.00?

A. Whatever they were. I don't remember the amounts.

Q. Now, you did not deposit that cashier's check for a considerable length of time in your own bank account, did you?

A. It was some time after. I don't remember. A period of time— What the days were, I don't know. It was not very long. [529]

Q. Will you make an explanation of why you did not deposit that in the account?

A. Very gladly.

Q. State it, please.

A. As I stated—well, I didn't state, but, as you know from the previous examinations, I had told you of coming down here with a debt of some $3,000.00—approximately $3,000.00 that I owed to the First National Bank of Globe, which later went into the Old Dominion Bank. There was some little dispute over the interest items that had come up, which had been discussed just at this time, at a time when I was settling what we call the Armour estate in the courts at Globe and, in the final settlement of it, Mr. Wilson and myself began to discuss the note at the bank, so, when the big payment came in, instead of depositing the money in cash, I took the money in the form of a cashier's check,

(Testimony of George W. Shute.)

so that it would not appear in the account, pending the settlement which I had with the Old Dominion, which was made thereafter and then the amount that I owed the Old Dominion as we settled it came out of that check.

Q. And, if I remember correctly your testimony at that time, you stated that you kept this money out so that they would not know that you had that and it might interfere with your settlement with them?

A. I don't think I stated it in just that way. In fact, I did not. What I stated was that I did not deposit it in the bank where it would be subject to some legal attack, which would not be a very pleasant thing.

Q. Now, you state the amount as about $3,000.00 that you owed that bank. As a matter of fact, there was one item of $3,000.00 and another item that ran the total in excess of $4,000.00 or $4200.00, was there not?

A. That amount seems out of reason. I don't think that is right. [530]

Q. Well, one of those settlements, you had another party on the note with you, did you not?

A. I don't remember, Mr. Nealon.

Q. Wasn't your brother liable on that note along with you? A. I believe there was.

Q. Now, that amount was $3,000.00 and settled for $1500.00, was it not?

A. No, $2300.00, I think. Well, now, maybe there was a settlement on that note of $1500.00. I

(Testimony of George W. Shute.)

don't remember but that is what the final arrangement was.

Q. The other amount was originally $1400.00 and there had been fifteen years accumulated interest on it, making a considerable sum?

A. I don't remember but I do know that the most of the two payments were interest amounts—not principal but interest amounts, involving transactions that myself and my brother had that had run through many years and it was to take up overdrafts and things of that sort that had made up the original amount and then the interest accumulations ran them up to whatever they were at that time.

Q. That amount was settled for $700.00, was it not?

A. I don't remember whether there was any separation or just what it was or whether they made the division after we agreed that it could be settled on a basis, I think, of twenty-one or twenty-three hundred dollars—whatever it was. I do not know that when it was finally arranged that I did not have enough to pay it and I gave them two postdated checks to make up the difference.

Q. I will call your attention to the testimony given by yourself, in answer to questions by Mr. Lewis. "The main part of the indebtedness was interest and he had agreed he would settle on the basis of something between twenty-one hundred and twenty-three hundred dollars. This so-called Beardsley fee came in about that [531] time and

(Testimony of George W. Shute.)

I did not want to deposit it, as the bank would learn of it and then there I would be without any settlement, so I took a cashier's check for it, so it would not appear through the bank."

A. I think I testified to that.

Q. That is the way you testified. Then, "Did you have more than this cashier's check you turned over to England? The account will show that. As soon as I made the arrangement with the bank, I sent the bank a check for $2,000.00. I lacked $200.00 of making the amount and sent them the postdated checks of $100.00 each to make up the difference." That is correct, is it not? A. Yes.

Q. Now, you were keeping this money out of the bank, in order that you might make a compromise of your indebtedness to the Old Dominion Bank without their knowing of your receipt of this money of money; was that it?

A. No, I won't say that.

Q. Well, just explain it your own way.

A. I have explained it as fully as I think is necessary, unless the Court advises me to make some other explanation of it. The matter of the amount that was due the bank would take a long time to explain how those matters arose in connection with my brother and the settlement of it would take a long time that I don't believe are material.

Q. In regard to that Hudson car for a moment; that was in the basement of the A. E. England Motors Company for a considerable period of time, was it not? A. Yes.

(Testimony of George W. Shute.)

Q. I don't know whether I asked you this question before or not. You refused to give me an order for that car when I demanded it, did you not?

A. I believe I did at one time.

Q. But stated you would purchase the car at the blue book price? [532]

A. Well, that was made after; after we had gotten down to the point where I wanted to get the matter straightened up and settled up and get the matter behind me; then, I agreed with you that I would pay you the blue book price for it, which was considerably more than the car was worth.

Q. And you did pay that?

A. I did pay that.

Q. When you were asked at the meeting of creditors why you did not schedule it, referring to the Hudson car, you stated that you turned it back; that is correct, is it? A. Yes.

Q. You made that statement? A. I did.

Q. And then you afterwards stated that you had an interest of several hundred dollars in the car, did you?

A. I don't remember just how that arose or just what the testimony was on that point.

Q. Now, Judge Shute, after you paid this $2,000.00 in to England in June, 1927, and received back some seven hundred odd dollars from him, you had paid everything that you owed him up to that time, had you not? A. In June, 1927?

Q. Yes.

A. I don't know, Mr. Nealon. I could not tell

(Testimony of George W. Shute.)

without looking at the books and I looked at that ledger sheet and I could not understand the ledger sheet. I don't know. Whatever the books show, they show.

Q. Why was the return made to you of the money, then, the $700.00?

A. I imagine that that was what was done. I imagine that that squared me up at that date, if it is as Mr. Wedepohl told me, whatever it was. I don't know. I never looked at the books. I [533] never questioned them.

Q. On the Hudson car prior to that time—it squared up everything on the Hudson car that you owed prior to that time?

A. I assume that when I went there and asked Mr. Wedepohl what the amount of my balance was that he told me; that I gave them this check and paid that amount and went off and never knew what those books showed at that time.

Q. But you knew that you had paid up in full?

A. I think that that would necessarily follow.

Q. Then, in August, you bought the Essex car?

A. I believe, in August, the Essex exchange was made.

Q. And there was only a small balance due on that? A. What do you mean?

Q. The old car covered most of the purchase price of the Essex car?

A. No. I think that the old car, as I remember, and I think this comes from the ledger sheet, because I never asked Mr. England about it. He has

(Testimony of George W. Shute.)

always said, "Whenever these cars are traded in or turned in, we will get for you just as high a price as we can and credit that amount," but my recollection of it is that there was about $300.00—$350.00—along there somewhere, which was the amount of the sale of the old Essex that had gone to Mrs. Shute in 1925.

Q. Now, let me call your attention to the fact that after you had paid up in full to England in June of 1927, he subsequently, during your absence in October, sold your car; that is true, is it not? A. Yes.

Q. Now, the money derived from the sale of that car and $250.00 paid by you paid for the new car in full and was so credited on the books of England, was it not?

A. I don't so understand it. [534]

Q. If the books show this payment made at that time, you will say they were correct, will you not?

A. Whatever the books show relative to payments and things of that sort is whatever they show. I don't dispute the books at all.

Q. You made a payment on November 25 of $250.00 to the A. E. England Motor Company?

A. I made, I remember, from the examination and from what has transpired, that I made two $250.00 payments and I am quite sure that both of those two $250.00 payments were made on the Essex car for the express purpose of getting it clear, so that there would be no liens on it or strings on it so far as Mrs. Shute was concerned.

(Testimony of George W. Shute.)

Q. But, I want to call your attention to the fact that you did on November 25 make a payment of $250.00 to England.

A. If the books so show, I certainly made it.

Q. The check is in evidence, Judge Shute.

A. That is all right.

Q. Then, the price charged you for that car was $1535.00, was it not, the Hudson car—the last Hudson car, the one that there has been so much talk about? A. That is what the books show.

Q. That is what the books show? A. Yes.

Q. And that is the price of the car, with the dealer's commission off?

A. That is the way I understand it.

Q. You made your arrangements with Mr. England that you were entitled to that discount?

A. No.

Q. Haven't you so testified and hasn't he so testified? A. No. You say he so testified?

Q. Yes, in your presence. [535]

A. I am sure I don't remember any such testimony. I have not testified to that at no time.

Q. You did get the dealer's throw-off or commission?

A. Ultimately, that is what happened, all of it.

Q. And that actually shows in the account there that the car was paid in full by the time you paid that November 25 check of $250.00, whether it was paid on that car or somewhere else?

A. I am sure I don't know what the books show

(Testimony of George W. Shute.)

as to whether or not those are payments. Whatever the account shows, that is what it shows.

Q. You have examined the account?

A. Yes, I have. In fact, I had a copy of it struck off the other day for counsel's use.

Q. And you examined that? A. Yes, I did.

Q. I call your attention to the credit on that account of October 6 of $1185.00, of October 7 $100.00 and of November 26 $250.00. Those are the entries as they appear there?

A. Whatever they show, Mr. Nealon.

Q. Well, look at that, please.

A. You have read them.

Q. Now, on the opposite side of this ledger account of the A. E. England Motor Company appears the charge of November 30 for the Hudson sedan, serial No. 799342, Motor No. 495579, and the charge is $1535.00?

A. If that is what they show, that is what it is.

Q. Now, those three items of $1185, $100.00 and $250.00 paid October 6 and 7 and November 26, exactly make up the sum of $1535.00, do they not?

A. I don't know. I never added them up.

Q. Will you kindly add them up.

A. Is that what they make? [536]

Q. Yes.

A. I will not take the time. I will take your word for it.

Q. Now, that is the last car transaction with England prior to the bankruptcy proceedings? The only reason I call your attention is this car, what-

(Testimony of George W. Shute.)

ever the motor, that appears subsequent to that time and with which we have no concern. A. Yes.

Mr. NEALON.—If your Honor please, you seemed to be laboring under a misapprehension the other day when you spoke about this car account. I would like for you to examine it.

The COURT.—I have since thoroughly.

Mr. NEALON.—Q. That $250.00 payment was the same day that the conditional sales contract was made, is it not?

A. I don't know.

Q. Judge Shute, in regard to the Globe homestead property, you testified before the referee, did you not, that from one to two thousand dollars of the consideration paid therefor was paid out of your community funds—your earnings since marriage; that is correct is it not?

A. One to two thousand?

Q. From one to two thousand—somewhere between one and two thousand dollars.

A. I don't remember, Mr. Nealon, just what I testified to about that.

Q. If the record so shows, that would be correct?

A. If the record shows, it shows.

Q. Now, that was an actual fact, was it not?

A. It was what?

Q. That was an actual fact that you did pay from one to two thousand dollars?

A. I think more than that. I think more than that, Mr. Nealon.

(Testimony of George W. Shute.)

Q. Now, at the time you purchased that place, you gave this [537] mortgage of $3,000.00 to Mrs. Holmes and the balance of the consideration amounted to $3500.00, making a total of $6500.00, did you not? A. No, I think the opposite.

Q. The mortgage was $3500.00? Pardon me.

A. Yes.

Q. And the cash $3,000.00? A. Yes.

Q. Now, since that time, you have paid from your earnings the sum of $3,000.00 to Mary E. Holmes upon that mortgage, have you not?

A. Since what time?

Q. Since the time that you purchased that property.

A. Yes, outside of the amounts that came from the rent from the property itself.

Q. You paid $3,000.00 on the principal during the year 1926?

A. Yes, I think that it all came from—with the exception I told you, it all came from my personal earnings.

Q. Now, can you tell how much altogether you paid on the mortgage, with interest?

A. No, I can't tell exactly.

Q. Including the interest. A. I can't tell.

Q. Something like $4600.00, isn't it?

A. I don't know.

Q. These other sums were paid from your earnings as well, were they not?

A. What other sums?

(Testimony of George W. Shute.)

Q. These other sums that you paid on that mortgage? A. I have just told you.

Q. Interest and taxes, etc.

A. Well, you mean interest and tax payments? [538]

Q. Yes.

A. I think many of those came from the rent on the property, although I may have paid out of my own earnings a part of them.

Q. The taxes paid on that property, as shown in your 1927 income taxes, were paid from your earnings, were they not?

A. I am not sure, Mr. Nealon. I don't know. I could not answer that.

Q. You recall that your receipts to the payments of taxes thereon was rendered by you as a community property report in your income tax for 1927?

A. Those reports show just exactly what the situation was with respect to the income tax, Mr. Nealon.

Q. Haven't you examined it since the testimony in the court about the— A. When?

Q. Yesterday. A. No.

Q. Did you examine it before Mrs. Parry testified? A. Yes.

Q. Well, aren't the facts just as I have stated them; that they appear as community property receipts and expenses in that report?

A. The reports will show just what it was, Mr.

(Testimony of George W. Shute.)

Nealon, without any question at all—just what the situation was.

Q. Can't you remember that, so we can save a little time in here?

A. I am trying to save time. That is the reason I answer as I do.

Q. Now, they so appear also in your 1926 report, do they not?

A. If it does, that is what was done.

Q. And they show also in the reports for Mrs. Shute for those two years—income tax reports? Now, Judge Shute, you recognize that the story of the consideration for the property and the [539] acquiring thereof as you told to-day differs somewhat from your testimony before the referee in regard thereto, do you not? A. I don't think so.

The COURT.—What property have you reference to now, the real property?

Mr. NEALON.—The real property, yes, if your Honor please.

A. If there is any material difference, I don't know just what it is. I tried to be as honest about it and as fair about it as I could.

Q. Now, you did not heretofore testify that the title to the Prescott property was in your name, did you? A. I think I did.

Q. On previous examinations?

A. I think I did.

Q. When?

A. I think when I was first asked about it. If I did not, why, it was simply an oversight, because

(Testimony of George W. Shute.)

that was the fact. That was exactly what took place and I am quite sure that I did testify to that effect.

Q. Now, that Prescott property was sold to whom? A. To Johnnie Robinson.

Q. And the consideration was how much?

A. I think, as I told you, I am very uncertain about that consideration. Mrs. Shute and I have both talked it over and I have tried to look back to see if I had anything which would indicate what was paid for that property and I have nothing, but our recollection is that we got $1500.00 for the little piece across the street and $3,000.00 for the property at the corner of Mount Vernon and Gurley. That is only as we remember it. This transaction took place in 1916.

Q. That is the sale to Robinson?

A. Yes, I think it was 1916. [540]

Q. There were two pieces of property?

A. Two pieces.

Q. And the title to each of them was in your name?

A. Both were, under this deed that came from Mrs. Cullumber in 1910, at the time of her death.

Q. Now, the consideration for that property, when you purchased it, was what or was it a purchase or was it a deed for love and affection.

A. Neither one.

Q. All right. State.

A. I have related it just as fully as I could on my

(Testimony of George W. Shute.)

direct examination just what took place and how it happened.

Q. The consideration for that deed was a community consideration, was it not?

A. There was no consideration for it at all. It should not have been made that way and was a pure error that was brought about, apparently, by some misunderstanding between Aunt Mary and Charlie Herndon, who made the deed, and we never changed it after it was *did* and did not attempt to.

Q. You made no conveyance to Mrs.—

A. No, I made no conveyance.

Q. During any of that period?

A. I just left it as it was. We immediately began to try to dispose of the property, because, as we knew, it was not profitable to have it up there where we could not take care of it.

Q. Did any community consideration go into it at all?

A. No, no community consideration. It was made for the purpose, as I told you, to save that situation, going to her.

Q. What was her condition at that time?

A. Mrs. Cullumber was expected to die from day to day, from the time that I arrived there until her death took place. Mrs. Shute remained until the end. I was district attorney at that time and [541] I returned to Globe and stayed, I think, one day—maybe two days and then I returned to Globe, where we were living.

Q. I show you what purports to be a certified

(Testimony of George W. Shute.)

copy of a deed from Mary B. Cullumber to you—quitclaim deed and ask you if that is one of the tracts to which you have reference?

A. Yes, that is one of them.

Mr. NEALON.—It is offered in evidence, if your Honor please, without objection.

Q. Was this a portion of the property which was sold to Mr. Robinson? A. He bought both pieces.

Q. I show you what purports to be a warranty deed from Mary B. Cullumber to you and ask you if that is—

A. This appears to be the other one covered.

Whereupon Creditor's Exhibits Nos. 27 and 28 were admitted in evidence without objection, as follows: [542]

Creditor's Exhibit No. 27 consists of a quitclaim deed dated October 18, 1909, between Mary B. Cullumber of the City of Prescott, County of Yavapai, Territory of Arizona, party of the first part, and G. W. Shute of the County of Gila and Territory of Arizona, party of the second part, consideration $10.00. The deed is the usual form of quitclaim of property described as follows: All and singular the following described land, property [543] and premises, situate, lying and being in East Prescott, in the aforesaid County of Yavapai, viz.: Commencing at a point being the southwest intersection of Gurley and Mount Vernon Streets, in said East Prescott, and running from said point south along said Mount Vernon Street on the west side to a point one hundred and fifty feet; thence west fifty

feet; thence north one hundred and fifty feet; thence east fifty feet to the point of beginning. It contains the following clause: It is expressly provided however that the said Mary B. Cullumber, party of the first part, is to have and receive any and all rents and other income from said property during her lifetime, or until the said property shall be sooner disposed of by the said G. W. Shute. It is signed by Mrs. M. B. Cullumber and acknowledged by Mrs. Mary B. Cullumber before Allen Hill, notary public, Yavapai County, Arizona, on October 18, 1909.

Creditor's Exhibit No. 28 consists of a warranty deed from Mary B. Cullumber to G. W. Shute for a consideration of $10.00 on the following described property: All and singular Town Lot number twelve (12) in block number seven (7) situate, lying and being in East Prescott in the County of Yavapai in the Territory of Arizona, according to the survey and plat of said East Prescott, on file and recorded in the office of the County Recorder of said County of Yavapai, and the said lot being so marked, bounded, described, numbered and delineated on said map of East Prescott. The said lot being fifty feet front by one hundred and fifty feet deep. The deed contains the following provision: It is expressly provided, however, that the said Mary B. Cullumber is to have and receive any and all rents and other income from said property during her lifetime, or until the said property shall be sooner disposed of to other parties by the said

(Testimony of George W. Shute.)

G. W. Shute. The deed is dated October 18, 1909, signed Mrs. Mary B. Cullumber and is acknowledged by Mrs. Mary B. Cullumber on the same date before Allen Hill, notary public, Yavapai County, Arizona. [544]

Mr. NEALON.—Q. Subsequent to the acquirement of this property in Prescott, you had a lawsuit over it, did you not, Judge Shute?

A. No, I don't believe—

Q. That some heirs of Mrs.—

A. There was some question came up about it with a fellow by the name of Stephens, who was, I think, a nephew of Mrs. Cullumber. He raised some question about it and there was some little disturbance over it that did not amount to much and the extent of which has completely slipped my mind. That, however, amounted to nothing, as I remember it.

The COURT.—Q. You mean to say that you gave no consideration?

A. None at all, your Honor.

Mr. NEALON.—That was a suit of William Stephens, as the administrator of the estate of Mary B. Cullumber, deceased, versus yourself, filed in Yavapai County, No. 5431, was it not?

A. Whatever that record shows.

Q. Look at it, please.

A. This is the record, is it?

Q. Yes, you can see that they are original papers.

A. Yes, I believe that is the situation. May I look at the date of it, Mr. Nealon? I am rather

(Testimony of George W. Shute.)

curious. I would have sworn it was almost immediately after Aunt Mary's death.

Q. The record would indicate about ten days afterwards? A. Yes.

The COURT.—What is the purpose of the document? [545]

Mr. NEALON.—I want first to identify his signature to it, call his attention to it and inquire about it.

The COURT.—Very well.

Mr. NEALON.—Q. Judge Shute, you will notice that this is a sworn answer filed in this case by you and duly signed by you?

A. That is my signature.

Mr. MOORE.—Well, I suggest, if you are going to question the witness about it, you had better identify it so that we will know what your questions are directed to. I don't want to read it until you offer it in evidence.

Mr. NEALON.—I think I have a right to examine from an instrument before it is put in the record after it has been identified by the signature of the witness.

Mr. MOORE.—You may examine in regard to it.

The COURT.—Oh, well, don't stop to argue that now. Go ahead and ask your questions. If I think it is admissible and you don't introduce it, why (several words not audible) whatever is necessary to give the court the desired information. I can't stop for you to go over it any further. You must have had plenty of time to go over that document

(Testimony of George W. Shute.)

and I can't wait. You are losing time. Ask your questions and let us get along.

Mr. NEALON.—In this answer, Judge Shute, you set up a community consideration for this property, did you not? [546]

A. I haven't read it. It has been a long time ago. There wasn't any consideration for it. The transaction took place exactly as I related it, as near as I can remember it.

Q. Didn't you set up as a defense in this case that there was an agreement—an understanding between you and the defendant that you would support her for the rest of her life?

A. Is that in the answer?

Q. I was trying to find it.

A. I think I could explain that very easily, if it is in there.

Q. I call your attention to paragraph II thereof. "That for many years prior to the death of said Mary B. Cullumber, said Jessie M. Shute resided with her in the city of Prescott and the said Mary B. Cullumber was almost entirely without means for her support. That said Jessie M. Shute secured employment in various capacities and for three years was a teacher in the Normal School at Tempe, Arizona, where she resided with the said Mary B. Cullumber and the two children, Arthur and Adah Small, and as this defendant is informed and believes, gave to said Mary B. Cullumber her entire earnings for her support, which earnings were put back into the Prescott property described in said

(Testimony of George W. Shute.)

complaint, after the deduction of their living expenses. That this continued until the marriage of said Jessie M. Shute to the defendant several years ago. That shortly after said marriage the said Mary B. Cullumber came to the town of Globe, the residence of this defendant and his wife, and resided with them several months and then returned to her home in [547] Prescott, and shortly after this the said Mary B. Cullumber began writing defendant and his wife, telling how hard it was to make both ends meet, that her property in Prescott, being the same described in the complaint, rent*ly* poorly, and that the expenses, taxes, assessments and other matters in connection with said property kept her in such financial condition that she had very little to live upon. That this defendant and his wife continued from time to time to send to said Mary B. Cullumber sums of money for her support and clothing, and that this continued on down to the summer preceding the death of said Mary B. Cullumber, and that during said last-mentioned summer defendant and his wife sent to said Mary B. Cullumber fifty dollars to pay her way to Los Angeles, where she met the wife of this defendant and was supported by her while she remained in Los Angeles. That at that time, in Ocean Park, California, said Mary B. Cullumber stated that she could not manage to keep her property expenses up; that the city was demanding the installing of a sidewalk which she was unable to have done, and she then requested the wife of this defendant to take

(Testimony of George W. Shute.)

the property and put in this sidewalk and assume the management and ownership of this said property. That the said Mary B. Cullumber then returned to Prescott, and shortly thereafter defendant and his wife were advised that the said Mary B. Cullumber was in a low state of health, and that said defendant and his wife immediately left for Prescott and found the said Mary B. Cullumber at the Mercy Hospital in Prescott; that on the day after their arrival in Prescott, the said Mary B. Cullumber repeated to this defendant what she had stated to his wife the [548] previous summer, to wit: that in her old age she could do nothing with the property; that she was unable, and had been unable the whole preceding summer to do her ordinary household duties, and stated that it was her desire to stay with the defendant and her niece, the wife of said defendant, and her said nephew, Walter Smith, as she chose, and that she would deed to this defendant her property in Prescott, being the same property described in the complaint herein, if he would attend to the construction of said sidewalk in front of said property, and she be given a home as above set forth; and that in this way she could compensate the defendant and his wife for moneys which they had paid to her, off and on, during several years prior thereto for her support and benefit, and at this time she spoke of the tender and loving way in which the wife of this defendant had for many years cared for and aided her, both by her affection and with money which

(Testimony of George W. Shute.)

the said wife of this defendant had earned and paid over to her. That thereupon, this defendant, his wife being present during all of said conversation, agreed to the proposition made by said Mary B. Cullumber, above stated, and at her special request the deeds described in the complaint herein were prepared and presented to the said Mary B. Cullumber for her signature, and she, knowing the contents of the said deeds and that the same transferred the title of the property described therein to this defendant, being the same property described in the complaint herein, signed, executed and acknowledged the same in the presence of and before Allen Hill, a Notary Public of Yavapai County, Arizona Territory. That from the time of this defendant's arrival in Prescott, as above stated, and during all the time thereafter and when [549] the said Mary B. Cullumber *d*igned and executed said deeds, she, the said Mary B. Cullumber, although physically weak, was mentally strong; that her mind was sound and clear and she understood what she was doing in signing the said deeds—" I will ask you if the consideration recited in there is not the true consideration that was given for the Prescott property?

A. I think all of those facts that are related in there are just as alleged.

Q. Then Mrs. Cullumber understood that she was deeding the property to you and not to your wife?

A. No, Mrs. Cullumber did not understand that, because the understanding was all of the time that

(Testimony of George W. Shute.)

this property should go to Mrs. Shute. In other words, Mrs. Shute owned a half interest in the property and always claimed what was called the grandmother property. You will notice that that answer is prepared by Robert E. Morrison down in Prescott and was upon facts furnished there by Mrs. Shute, evidently, and sent to me in Globe, where I signed the verification on it.

Q. The verification was at Globe?

A. I believe it was.

Q. You of course read and understood it before you signed it? A. Yes.

Q. I want to read from the certified copy. "That while the consideration named in each of said deeds is the sum of ten dollars, the actual consideration was for and on account of large sums of money paid over by this defendant to said Mary B Cullumber for her support and also by the wife of this defendant for a like purpose, and a further consideration was the love and affection between [550] the wife of this defendant and the said Mary B. Cullumber." That is true, is it not?

A. I think that is true.

Mr. NEALON.—Now, we have both the complaint and the answer here,—a certified copy—and ask that they be admitted in evidence.

The COURT.—They may be admitted.

Mr. NEALON.—Q. Now, Judge Shute, you recognize that there is a consideration in that deed?

A. As expressed in the deed, yes. The facts were

(Testimony of George W. Shute.)

just exactly as I told them to you and relate them to you.

Q. And that consideration, a large portion of it, was funds earned by you after your marriage?

A. The moneys that we had sent to Mrs. Cullumber, of course, came out of my earnings.

Q. And they were community funds?

A. Yes.

Q. And your agreement to support her for the rest of her life, the principal consideration in the deed, was a community obligation?

A. Mrs. Cullumber, as I told you, when I went there at Mrs. Shute's request, was in a condition that we did not expect her to live from day to day and it was not but a little while,—the day I don't remember but it was not but a little while after that until Mrs. Cullumber died. The reason for the giving of the deed was to transfer the property back where it properly belonged, to Mrs. Shute, because I had no interest in it, and had never given anything to the property or for the property and anything that Mrs. Cullumber had gotten was—arose [551] through the relationship between Mrs. Shute and Mrs. Cullumber.

Q. But if she had recovered and lived for ten years you had made a community obligation to support her during that period, did you not?

A. Well, that might be construed that way. I don't know.

Q. And that was a consideration for the deed?

A. No.

(Testimony of George W. Shute.)

Q. You so contended in this answer of yours, did you not?

A. That answer, as I say, was filed for the express purpose of overcoming what they claimed was a condition of mind existing upon Mrs. Cullumber's part, namely, that she did not know what she was doing at the time she signed this agreement; that she was mentally incompetent, and those were the facts prepared by Mr. Morrison to meet those that arose long after the death of Aunt Mary.

Q. You read the complaint?

A. Undoubtedly did.

Q. The answer, I mean? A. Undoubtedly did.

Q. You verified it?

A. I swore to the verification to the answer.

Q. You subsequently mortgaged the property, did you not? A. Yes, I mortgaged it twice.

Q. To buy cattle with?

A. Once to buy cattle with and once for some other purpose. I have forgotten just what the other purpose was. Yes, I think there was two times. One was mortgaged at one time and then at another time both pieces was mortgaged. [552]

Q. Now, in view of that, do you wish to in any way correct your testimony in regard to there being no community consideration for the Prescott property?

A. I do not. The facts are just as I have related them surrounding that transaction.

Q. Now, you sold this property to Mr. Robinson, when? A. To who?

(Testimony of George W. Shute.)

Q. To Mr. Robinson.

A. Johnny Robinson. I think it was 1916 but I am very uncertain about those dates. I notice that what I thought was 1910 was 1909. That shows the way it might go. It might be 1915 and it might be 1917 but that is approximately correct.

Q. Now what did you do with the money, when you received the consideration from Mr. Robinson, on the sale of this property?

A. It was used in some capacity. I don't know. I can't remember exactly what was done with it. It seems to me that a part of it was used in paying off the mortgage that still existed upon the property that I had deeded to Mrs. Shute in 1907. I am not sure about that. In fact I can't remember just how that money was applied. The only thing that I do remember was that Mrs. Shute got none of it, because that was ever after that a bone of contention between the two *if* us relative to her rights in that money.

Q. Some of that money was invested in cattle, was it not? A. The sale from the—

Q. Yes. A. No.

Q. What did you do with the money then, other than you stated? Can you tell any more completely about that?

A. I have told you about what happened to it. It was used [553] at that time as I stated.

Q. You recall Mrs. Shute's testimony before the Referee in answer to questions by yourself, that

(Testimony of George W. Shute.)

some cattle were jointly owned by her and your brother and perhaps yourself, do you not?

A. Yes, I remember it.

Q. She stated that the cattle were hers, so far as that interest was concerned, did she not?

A. She always claimed those cattle.

Q. And claimed them as a result of funds that were derived from this Prescott property?

A. No, you have that wrong.

Q. All right, explain it, please.

A. She always claimed it because of money that was put into those cattle, which went in in 1911 or 12—along there somewhere—was money that was derived from the mortgage of this property back in 1911 or 1912—along there somewhere, but not from the sale of it.

Q. The property was afterwards lost—I mean the cattle were afterwards lost through drought or something of that kind?

A. Well, they were finally—the business transaction was a loss but they were finally sold.

Q. Now do you recall her testimony to the effect that the amount realized from the sale of the remnant of cattle was insufficient to pay the mortgage or other indebtedness against them, do you not?

A. I don't remember just what was said about that. I would be glad to see it, so that I might check it up.

Q. It is Mrs. Shute's testimony there.

A. Well, if she did testify to it, Mr. Nealson, why we will say that she did, whatever it was. [554]

(Testimony of George W. Shute.)

Q. And you will recall further that she testified, in answer to your question, that the amounts so realizes being insufficient to pay the indebtedness, that it was necessary to sell the little house in Globe, in order to pay the balance?

A. No, she never said anything of the kind.

Q. All right, we will get the record on that.

(Deed to J. H. Robinson was then admitted in evidence without objection.)

Mr. NEALON.—Q. Now, when was the Maple Street property in Globe bought, Judge Shute?

A. I think that was in 1924. I would say about that date—1904.

Q. 1904. When was that disposed of?

A. I think in 1907 or 1908.

Q. Do you recall about what amount was received for that property?

A. No, I do not. I think, though, the way I figured it, I know this, there was a mortgage on it and I sold it to my own father and I figured up the amount of money that I owed when I came back from Northwestern. He assumed the payment of the mortgage and gave me a sufficient amount of money to clear off the debts that I had.

Q. So far as the Maple Street property is concerned, there was no surplus left when you sold it?

A. No, no surplus.

Q. Now the next piece of property you acquired was what you have called the Devereaux Street property? A. Yes.

Q. Now, when was that acquired?

(Testimony of George W. Shute.)

A. I think in 1907. [555]

Q. That was bought on a small cash payment and the balance monthly, was it not?

A. Yes, I think the purchase price of the property, if I remember it rightly, was $2700.00. Paid in cash eleven or twelve hundred dollars, and borrowed the balance of the money on the property itself.

Q. That is, of the purchase price? A. Yes.

Q. And that you paid our of your own earnings?

A. The mortgage?

Q. Yes.

A. Well, that mortgage was carried a long time. I don't remember. It went through two or three hands. I borrowed from Peter to pay Paul and it went down through a good number of years and I am not just sure how that property—that mortgage was finally disposed of. I am inclined to think that a portion of it came from the sale of this Prescott property. It runs through my mind that that was a portion of it.

Q. Do you mean a portion of the payment of the mortgage itself? A. Yes.

Q. Came from the sale of the Prescott property?

A. That runs through my mind that that is true. I know the mortgage was not discharged until way down toward 1915 or 16—along there somewhere.

Q. Now, you owned that property up until 1922, did you not? A. 1920.

Q. 1920? A. Yes.

Q. To whom did you sell that property? [556]

(Testimony of George W. Shute.)

A. That property was transferred and went on the deal—went on the trade for the property that is in controversy here. I am not sure whether the deed was made directly to Hoyt Medlar or whether it was made to the First National Bank of Globe, but one or the other. In other words, as I stated, the trade took place in there during the matter of purchase, whereby the Devereaux Street property was credited upon the purchase price of the Cottonwood Street or the Sycamore Street property, and became part of it but just how that was handled, I don't know. In other words, there was John Griffin interested in the trade, Hoyt Medlar was interested in the trade, and a man by the name of Sanders, in whose name the deed stood, was interested in the trade.

Q. Was there a mortgage given against that property by Hoyt Medlar and Ruth Medlar to G. W. Shute, dated July 1, 1922, and recorded August 9, 1922, Judge Shute, in the sum of $3629.50? A. What is that?

Q. There was a mortgage given against that property by Hoyt Medlar and Ruth Medlar to G. W. Shute dated July 1, 1922, and recorded August 9, 1922, was there not, of $3629.50? That Devereaux Street property, I am referring to now.

A. I don't remember just how that worked in, Mr. Nealon. All that I do remember was that, as I told you, John Griffin was interested in the trade and Sanders was interested in the trade and Hoyt Medlar was interested in the trade. When we first

(Testimony of George W. Shute.)
bought the Cottonwood Street property, it was deeded right directly to Mrs. Shute and the money was borrowed from Mrs. Holmes and there was a mortgage carried at the same time by Sanders for a time [557] upon the Cottonwood Street property and then that mortgage to Sanders was taken care of by this deed with Hoyt Medlar. Just the dates I don't remember.

Q. What I am asking you about is a mortgage executed to you in 1922 for $3629.50. Have you any recollection in regard to that mortgage?

A. I have a recollection that there was a mortgage or some sort of an understanding that ran to Hoyt Medlar, because he is the one through which the trade worked, whereby the property went into the Sycamore Street property.

Q. This mortgage is two years subsequent to the deed to you, is it not?

A. That seems to me to be impossible. It does not seem to me that it could have been that long, because it seems to me that this trade was traded immediately; that that was one of the things that induced me to go into this deal with Sanders, because of this interlocking thing.

Q. Why was this mortgage given to you, Judge Shute? A. The Hoyt Medlar mortgage?

Q. You notice it is a mortgage to you, not to Mrs. Shute?

A. I am sure I don't know, except it was done in pursuance of this interlocking trade that took place

(Testimony of George W. Shute.)

there between myself, the bank, Medlar and Sanders, and Griffin.

Q. Now this mortgage—I might say that I am reading from information furnished me by the Gila County—

A. By the way was there a deed from—do you know whether there was a deed from ourselves to Medlar?

Q. If you wish me to I will read the record down on this.

A. I now ask that question. That will sort of—

Q. What was it? [558]

A. Was there a deed to the Sycamore Street—not the Sycamore but the Devereaux Street property from Mrs. Shute to Medlar?

Q. No. So far as the record shows, the title is still in Mrs. Shute.

A. Well, I can't answer it. I don't know. Now, that is a matter that I just simply can't answer because the trade took place in the manner in which I have testified to.

Q. Now, I will ask you about a mortgage—

A. I don't know why he would be giving a mortgage on it with the title in Mrs. Shute, except there may have been some reason there in carrying the trade into effect.

Q. Assignment recorded in Book 1, page 227, on August 9, 1922, by you to the First National Bank of Globe, for $3629.29, recorded August 9, 1922, acknowledgment taken by M. L. Harrison. Does

(Testimony of George W. Shute.)

that refresh your memory in any way in regard to that transaction?

A. No, it does not, Mr. Nealon. I can't remember the reason and the way that this transfer took place. I know that it took place and that is about all that I know.

Q. Now I will read you this, just to ask you about it later, and it perhaps will answer part of what you asked me about. The deeds to the part of Lot 1 are as follows: Book 13, page 184, dated August 17, 1907, Lucy Moorehead and J. H. Moorehead, husband, to G. W. Shute, recorded August 24, 1907, consideration $2750.00, the north forty feet by seventy-five feet top of lot one. Can you explain anything about that?

A. That is the Devereaux Street property.

Q. Subsequently there was a deed from you to Mrs. Shute of that property? A. Yes. [559]

Q. Now if this went into the Globe home place, which is the subject of controversy here, have you any explanation of why this mortgage was given to you two years after the purchase of that place—purchase of the Sycamore Street—

A. No, that does not seem to me to be reasonable. I can remember how it was done or why it was done, because the trade ran almost from the start, as I told you, and was finally settled up—what I thought was about six or eight months afterwards, at the most, by virtue of those different transfers from Griffin or from Sanders to Griffin to Medlar to the bank from Mrs. Shute and myself.

(Testimony of George W. Shute.)

Q. Was there a mortgage upon the Devereaux Street property at the time of the sale of it?

A. I don't believe there was. I have no recollection of there being a mortgage on it at that time. I think it was clear.

Q. In the testimony of Mrs. Holmes, there appears read in the record this letter from you to her, dated August 14, 1928, and addressed to her at her home in Massachusetts. "The insurance on the house has been kept up and I should have sent you the policies. They have been renewed and paid from time to time, so that the protection is there for any interest which you may have. The proceedings here can in nowise affect your interest." What do you have reference to, to the proceedings here? A. Will you state that—

Q. Read back the part that I have read.

A. Just the date of the letter.

Q. August 14, 1928.

A. Well, I must have had reference—

Q. To this bankruptcy proceeding? [560]

A. To this bankruptcy proceeding, yes.

Q. I continue reading the letter. "In fact, it has been left as it is with the express purpose of protecting me in a way on questions which I knew would arise relative to the house. The property in Globe belongs exclusively to Mrs. Shute and has from the beginning, but there is always some question in matters of this kind, and it was with this in view that I did not pay the entire mortgage at

(Testimony of George W. Shute.)

the time I remitted the $3,000." Just what did you mean by that, Judge Shute?

A. The letter is self-explanatory.

Q. What was it you had in view when you did not pay her the entire mortgage at the time that you paid her the $3,000?

A. I don't remember just why that expression was used in the letter. You see, that $3,000 was paid in 1926, was it not?

Q. '26, yes.

A. '26. I don't remember. I don't just know why I used that expression in the letter.

Q. Were you anticipating some trouble at that time?

A. I don't know whether I was or not. I don't know whether the matter had been taken up with me by Miss Birdsall at that time or not, but if it had not been, I can't imagine why there was any question about it.

Q. But in any case, you were purposely leaving a part of the mortgage unpaid, so that you might use that in some manner in future litigation; is that the idea?

A. Well, I don't know. That letter is just about as self-explanatory as I can explain.

Q. What did you mean by saying that it has been left as it is with the express purpose of protecting me in a way on a [561] question which I knew would arise relative to the house?

A. Undoubtedly I had in mind the very thing

(Testimony of George W. Shute.)

which did arise, namely, the claim by you of the community interest in it.

Q. Did you have in mind that there might be a bankruptcy proceedings?

A. No. You mean when the letter was written?

Q. Yes.

A. When the letter was written, bankruptcy proceedings had long been instituted.

Q. You had in mind, then, the bankruptcy proceedings at the time the letter was written? That is what you had in mind?

A. I assume that I did.

Q. But what did you have in mind at the time that you held back the payment of the balance and paid $3,000 on the mortgage?

A. The letter is just as self-explanatory as I can make it. I don't know. If I had taken it up with Miss Birdsall—if that matter had come in, undoubtedly I had that in mind. If it had not been, I can't imagine why I would make that statement.

Q. Well, in what manner did you expect to be protected by it? A. A simple reason.

Q. By Mrs. Holmes?

A. The simple reason that here was a balance on an unsatisfied mortgage, which, if I paid the amount off, I would immediately be charged with it, and it would just simply save me that amount of money if, in the final determination, if it was the result that the property was not her property but was community. [562]

(Testimony of George W. Shute.)

Q. Now, Judge Shute, you paid the $3,000 to Mrs. Holmes on the mortgage out of the community funds, did you not?

A. Yes, that was community.

Q. And, if that is true, as a matter of law, I am asking you now, wouldn't the community be subrogated to the right of the mortgagee as against Mrs. Shute as if this were separate property, if your contention is correct?

A. I don't get the question. If you are asking me as a legal proposition, I don't think I will discuss that with you, because I am satisfied that you and I would not agree upon the conclusion.

Q. Now, I will ask you then, why, if you paid from the community funds a sum of $3,000 on separate property of Mrs. Shute, didn't you list that $3,000 that you had so paid as an asset of the estate in this bankruptcy proceeding?

A. For the simple reason that it is my understanding and always has been that the title to the property—interest—whether it may be a separate interest or not is not determined by whether or not you may put separate funds into it but is dependent entirely upon whether or not it can be identified as separate estate and no amount that I might put into it could change the character of her estate as it was originally created. For no other reason.

Q. You do not recognize that the payment of a sum for the purpose of preserving the separate estate would give the party objecting any rights in

(Testimony of George W. Shute.)

subrogation as to the rights of the mortgage creditors?

A. That is not my understanding of the law as to community property in Arizona. [563]

Q. Well, isn't that a rather e*w*uitable proposition. rather than any question of community property?

A. I am not going to argue that with you.

Q. Anyway you knew that you had paid from the community funds $5,000 on the mortgage at the time that you made out your schedules, did you not?

A. Yes.

Q. Now you have testified that you have given Mrs. Shute this house in Globe to in part satisfy her for the proceeds of the Prescott property, is that right?

A. Well, no, that is not—you say that I have testified to that?

Q. Well, no, I mean is that the fact?

A. No, I don't think that is the fact.

Q. Now, it is your contention that the house in Globe is hers because it was paid off from the proceeds of the separate property at Globe, do you,—at Prescott? A. No, not at all.

Q. Not at all? A. Not at all.

Q. Didn't you testify, in your direct examination, that not one cent of community funds went into it, or something to that effect? A. Why, no.

Q. Then, just what is your idea, then? You owe her $4500? Is that right?

A. No, that is not my contention.

Q. All right; please explain it.

(Testimony of George W. Shute.)

Q. My contention is that at the time of her leaving Globe that she told me she was not coming back to Globe until I had a house for her and that she wanted it distinctly understood that ever after that the home would be hers, [564] so that I could not repeat the process of selling it, as I had done with what we will call the Maple Street property. That property, in pursuance of that understanding with Mrs. Shute, was deeded directly to her at the time or shortly after its purchase from Moorehead. In pursuance of that understanding, when we came down to 1920 and she became dissatisfied with living in the Maple Street property, because of certain things that are not material to this at all, she bought the property that we will call the Sycamore Street property, the property in controversy, and it was deeded directly to her and the property which we had had before that time, namely, the Devereaux Street property, went directly into that purchase price. I never even claimed an interest in that property of no kind at no time. Always it was Mrs. Shute's—belonged exclusively to her, and, as witnessed by the deposition of Mrs. Holmes, who did not know anything about this proposition, except what may have been communicated to her by letter,—in that deposition,—that old Puritanical old lady said that at the time she loaned that money it was her understanding that that home was hers,—Mrs. Shute's, just the same as her home was Mrs. Holmes' home. Where did she get it? It must

(Testimony of George W. Shute.)

have been discussed by letter or in some way at the time of that purchase.

Q. The letter is in the record is it not?

A. I believe it is, yes. I believe the deposition is in evidence.

Q. The deposition is?

A. It is in the record. I don't think there is any letter to that effect in there.

Q. Well, the copy of the letters—the letters that are there,— [565]

A. Oh, that is not what I refer to.

Q. What did you refer to?

A. I refer to the statement that Mrs. Holmes made in the deposition, it was always her understanding.

Q. Now, then, you are not making the contention any more that the property—Sycamore Street property was bought with the proceeds of the property at Prescott; is that right?

A. I don't think I ever did make that contention. There must be some error, because I don't think I made that contention. If I did, I certainly am in error that I would check right up, because when I worked it out and gone down through the matter, I can see very clearly just what these transactions were in the main.

Q. Now, may I call your attention, Judge Shute, to the very first meeting of creditors on May 1, 1928, in which this question was asked you as to that: "No other real property at Globe? No, there

(Testimony of George W. Shute.)

is no other property there except the place we lived in at Sycamore and First.

Q. That is in Mrs. Shute's name? That is her property. She got it about 1919. Was it purchased with her own funds? It was purchased with funds she obtained, except for a very small part, from the sale of some property she had at the corner of Gurley and Mount Vernon Streets, in Prescott. That was her property there? That was her separate property."

Q. Now, will you explain that testimony and those answers?

A. I can very easily see why I would say that, because the money that came in from this Prescott property in 1916, I had in mind had gone in part, at least, to satisfy this mortgage that was upon the Devereaux property there for the money that had come in and satisfied that mortgage and [566] went into the Devereaux property—had been transmitted directly through the Devereaux property to the Sycamore Street property. I can see why I would say that very easily.

Q. Well, now, which is the—

A. The statement that I make now is far better than the one I made then, for the reason that I have gone back over these transactions, have reviewed them with Mrs. Shute, have examined some of the records and the possibility that we have to determine just what was done and have clarified the situation considerably.

(Testimony of George W. Shute.)

Q. Then you are not now contending that your statement made on May 1, 1928, in regard to the consideration for the purchase of that Sycamore Street property was correct, are you?

A. Well, I am not entirely clear about that even yet. I am not entirely satisfied that a portion of the money that came in from the Prescott property did not go to help discharge the mortgage that was upon the Devereaux property.

Q. When was the mortgage on the Devereaux Street property satisfied?

A. I believe that that was—that is what makes me doubt it. It seems to me that that was in 1916. I have the release the original release but I haven't it with me.

Q. How much was that mortgage?

A. It seems to me it was $2,000. At that time, there was probably some interest added to the original amount. I don't remember. It was somewhere along there.

Q. I want to read you a little more of that testimony so that it may aid you in a further explanation. "This balance that you speak of, outside of what was received from the sale of this property in Prescott, what was that? [567]

A. That was paid partly by myself and partly by her out of money she had saved out of her housekeeping allowance. It is not all paid yet." You were referring there to the balance paid on the Sycamore Street property were you not?

(Testimony of George W. Shute.)

A. I think that is what that testimony has reference to.

Q. Now, you were further asked "How much is still due?" I am not certain. I would say approximately $700 to $1,000. Q. Then, at the time of the payment of this balance made by you and her out of housekeeping money, that was subsequent to the incurring of the indebtedness to Mr. Mackay? And your answer was "I think so. I think this transaction with the bank was in 1917 or it might have been in 1918 and I think the property was purchased after that." That is correct, is it?

A. I believe so.

Q. Then you were asked this question. "Then the amount you paid in was from community funds? Yes, it would be community funds. What was that amount, approximately? Well, it is pretty hard for me to say. It was paid in little small amounts from time to time and I don't know. I think I could probably get the amount of that." That is correct, is it not? A. That statement?

Q. Yes.

A. Yes, I think I made that statement.

Q. Now, giving some questions in regard to the worth, etc., you were asked this question: "Of the amount of the purchase price upon the property, do you think you paid as much as $1,000? A. Yes, I think I did. Q. More than that? I might have paid a little more than that. As much as $2,000? I don't think so." That was your testimony at that time? [568] A. Yes.

(Testimony of George W. Shute.)

Q. Was that correct?

A. It was correct in this, if you are directing the attention to the fact that I had paid in one check $3,000. I was testifying about these amounts that had come along which you had been examining me about relative to the small payments that had come up in that time.

Q. And those were paid from the community finds?

A. That is what I stated at that time. I was under the impression that most of those payments had been made by me out of little amounts that I had earned and, when I checked it up, I found that a considerable amount of those payments had gone in in the way of rent receipts to Mrs. Holmes.

Q. You spoke of the date of the Devereaux Street property there. What was the date of the indebtedness?

A. 1907, the original indebtedness was incurred. It never was discharged until 1916 or 17. Right along there.

Q. To whom was that indebtedness due?

A. I think the first mortgage ran to Dudley I. Craig, if my memory serves me. I may be just a little bit turned around on that. And then I borrowed from a man by the name of Fall on account paid to pay Craig and then later discharged the obligation to Fall. That is my recollection of the way that transaction went through.

The COURT.— . . . I wanted to refresh my recollection in connection with the question that

you asked him about this property and the conveyance. I was just wondering why the bankrupt could not have given his wife anything he wanted to before that time.

Mr. NEALON.—If your Honor please, we were proving insolvency the [569] other day, and your Honor limited us to ten years. We could have proven—at least that is my contention now—insolvency at a much earlier date than that.

The COURT.—When I spoke of the dated, I meant, of course, back to the date of the note,—obligation that was filed in this proceeding. How are we concerned with anything that preceded that as to community status of the property?

Mr. NEALON.—The rule in bankruptcy is, if your Honor please, if the conveyance was void as against any creditor at the time that it was given, it may be used—the advantage of that may be taken by the trustee in bankruptcy—any creditor. It does not make any difference whether it is the creditor that is represented in the estate or not. The rule is somewhat different from the usual rule to fraudulent conveyances.

Mr. DYER.—I call the Court's attention to the fact that the insolvency went back for a long period. It shows under this testimony that a debt due to the Old Dominion Bank was settled for $2500.00, which he himself said, according to his own testimony, had been running fifteen or sixteen or seventeen years and which was not settled until 1928.

The COURT.—Well, I suppose that could get

(Testimony of George W. Shute.)

all of us for concealing assets and making false statements if that would be the law.

Mr. DYER.—No, he was insolvent at the time he gave it to his wife. [570]

The COURT.—I understand that.

Mr. DYER.—And that insolvency continued until after 1918, when this debt occurred.

The COURT.—Go ahead.

Mr. NEALON.—Q. Judge Shute do you recall that you testified that the reason that you did not list your interest in the firm of Armstrong, Lewis & Kramer was there was some question about how much that interest was, did you not?

A. I think the conclusion which you drew may be a fair conclusion.

Q. Now, you had been discussing that before you filed your petition in bankruptcy?

A. You mean with the members of the firm?

Q. Yes, with Mr. Moore particularly.

A. Yes, we had.

Q. And the firm owned considerable personal property in which you had a one-fourth interest, did it not, at the time you filed your petition in bankruptcy?

A. The interest which I have in the firm assets is the same. I don't believe that my interest in the furniture and things of that sort would go to 25%. I must ask Mr.—

Q. 20% is it not? A. 20%.

Q. And 25% in whatever accounts belonged to the firm? A. That changed from time to time.

(Testimony of George W. Shute.)

Q. That changed according to these various contracts? A. Yes.

Q. Now, then, at the time you did make your schedules, you had a valuable interest in the physical assets of that firm, did you not? [571]

A. Yes, it now so shows.

Q. Now, why didn't it show at that time. There was no question about that at that time?

A. I don't think there was.

Q. Now, why didn't you show that in your schedules?

A. For the reasons that I have stated. In fact, I hesitated to list the firm assets as long as the matter was not properly adjusted and, after the conference with the trustee and after the conference with the referee, I listed everything that we could think of that would be properly listed, so that there would be no mistake about it at all.

Q. You will recall that that was after demand was made upon you for the amendment of your schedules? It was, an order by the referee.

A. That was the first meeting that it was talked and discussed, when we arrived at just what ought to be listed and what ought not to be listed.

Q. Why Judge Shute, that is not the time, according to your contention, when you should arrive at a show-down of your property; after a discussion in the first meeting of creditors, is it?

A. I am not going to argue that question with you. I tried to be just as honest about it and as fair about it as the situation would permit me to be.

(Testimony of George W. Shute.)

Q. Now the total amount of valuable assets that you listed amounted to $290.00 or thereabouts above your exemptions, did it not?

A. The schedule shows what it was.

Q. This is preliminary. Now, if the creditor had not made an independent investigation—had accepted your statements in every way in regard to that, in your schedules the [572] statement—that would have been all that would have been realized from that assets, would it have not?

Q. With all of my ignorance of bankruptcy law, with all of my error in interpretation, it has never been my understanding that errors could not creep into the listing of property and that the primary duty of the trustee is to assemble and collect the assets, no matter whether they may be on the schedule or not.

Q. You did not understand that it is the duty of the bankrupt to exhibit all of those assets—to report when he is filing his schedules in bankruptcy?

A. Not all of them, no, sir. I have never had any such understanding as that. My understanding is that he should list all of them that he knew belonged to the estate at that time, and the trustee would collect them and assume the burden of taking care of those assets for the purpose of disposing of his duty.

Q. How was the trustee to have learned of the existence of these assets?

(Testimony of George W. Shute.)

A. He could have learned that by any way that might be available. By asking, which was done; by going over lists of checks and things of that sort and determining what was listed and what was not listed; what belonged to my estate and what did not belong to it. It is a very easy process.

Q. Now, those checks had been produced at that time, had they, Judge Shute?

A. What, the first meeting?

Q. The meeting of May 1, I am referring to.

A. Had not been.

Q. Now, this property, this Sycamore Street property, ordinarily that would not have been discovered by anyone interested in the estate—this proceeding being filed in this [573] county and that property in Gila County, and would not have been in this case except that Miss Birdsall had been a former resident of Gila County and was familiar with the facts; is that not true?

A. That is not true.

Q. Well, please explain how the information would have—

A. Almost the very first questions that were asked me revealed the so-called discovered property that has been discovered and was known to the trustee from the first meeting on, without any question.

Q. That information was in the possession of the attorney for the creditor, who asked you the direct questions, and that was the way it was revealed.

A. I am sure I don't know, but there was no

(Testimony of George W. Shute.)

doubt about the revealing of it. No time to conceal it. No time to evade just exactly what the legal situation was.

Q. If there had been no trustee appointed, what then? A. I am sure I don't know.

Q. If the creditors had accepted your schedules as correct, what then?

A. They would not have lost anything by leaving off the Globe property.

Q. How about the other properties?

A. I don't know of any other properties that they would have gained except the policy. There would have been a loss on that and the car, which came in later, there would have been a loss on that.

Q. And the 20% of the office furniture?

A. Well, I don't know about that Mr. Nealon.

Q. The interest in the firm of Armstrong, Lewis & Kramer?

A. Well, I am sure I don't know about that. I don't know just what that situation would be. [574]

Q. And the other sums paid into the estate, making, with the car and the insurance, more than $2,000, that is all collected,—none of it was listed in your schedules at all; is that not true?

A. Well, the policy was not listed and the car was not listed and the result of it is shown by the testimony that has come in.

Q. To revert for just a moment to the savings account for a question that I omitted; at the time that you made these deposits in the savings account

(Testimony of George W. Shute.)

to the credit of Mrs. Shute, you knew you were taking funds that would otherwise have gone to the creditor who has filed a claim in this court, do you not?

A. Oh, I had no such understanding until the end of 1927.

Q. You did have in 1927?

A. Well, at the end of 1927, I began to see the storm clouds.

Q. And this debt was in existence before that?

A. Mr. Nealon, the record shows all of that stuff. What is the use of asking me when it is admitted.

Q. All right. You did that to conceal this asset from your creditors? A. I certainly did not.

Q. You saw the storm coming, you testified?

A. Yes, but that—

Q. And then you put it in this fund?

A. That was a fund that had started long ago and for an express purpose.

Q. Started in September of 1926, did it not?

A. Yes, 1926, or whenever the date of it was. Anything I put in that fund I put in there with the best faith in the world, without any intention of hurting anybody in all this wide world. [575]

Q. But you saw the storm coming at that time?

A. I think at the end of 1927—along there.

Q. Now, Judge Shute, you did testify in the referee's court that during all of this period said bankrupt had been with the firm of Armstrong, Lewis & Kramer did you receive any large sums of money from any other source than this you have testified

(Testimony of George W. Shute.)

to and your answer, "I think I have testified to all of then, either at this hearing or the other one." That is a correct statement?

A. I remember that, yes.

Q. Now, you had received, otherwise than from Armstrong, Lewis & Kramer, the sum of $5,000 net on the Julian deal? A. Yes.

Q. And you had received approximately $3,000 or $4,000 from Wesley Goswick and Packard?

A. No, I had not.

Q. Well, you had received at least $3,000 according to your testimony, hadn't you?

The COURT.—Now all of that has been testified to, Mr. Nealon. Why go over it again.

Mr. NEALON.—It was preliminary to another question which *I* witness ought to be informed of.

Q. Now you had received during that time a total of more than $9,000 that did not appear on the books of Armstrong, Lewis & Kramer that you had not testified to; is that not correct?

A. Whatever the record shows.

Q. And you knew that at that time, did you not—at the time you testified? [576]

A. What do you mean by knew?

A. You knew that you had received those sums of money, did you not?

A. Part of them I knew, yes.

Q. You testified in your direct examination that I had never demanded the lease of the Lynwood Stret property from you. I ask you if I did not demand that several times in the record?

A. Do you mean of the—

Q. In the examination.

(Testimony of George W. Shute.)

A. The written instrument itself?

Q. The written instrument itself.

A. Or the tenure? You probably asked for the written lease but I don't believe that I could ever find that lease.

Q. That lease has never yet been delivered to the trustee, has it? A. I don't think so.

Q. You stated yesterday that you would produce it.

A. I don't believe I had it. I remember that and, in fact, I did look for it. I know, however, I could not find the lease or pay very much attention to it, being one of those sort of things that was simply the evidence of my right to live there during the period.

Q. Don't you think the trustee should have the right to examine the instrument?

A. Sure. I should have been very glad to turn it over to you, if I could have found it.

Q. You should have listed that?

A. No, I didn't list it, and it should have been listed. There is another instance of where a listing ought to take place of whatever it is worth. [577]

Q. Now the lease did have the last month's rent paid upon it? A. It did.

Q. And the first month's rent, after bankruptcy, had been paid two days before your filing of the schedules?

A. I believe the record shows that.

Q. Of course, that matter is in issue before the referee. Now the question of—

A. Your right to the lease?

(Testimony of George W. Shute.)

Q. Of my right to the sum of $150.00.

A. Yes. No demand has ever been made by you, Mr. Nealon, for the lease or for the occupation.

Q. You mean for the possession of the property? We won't dispute.

A. Oh, you did demand I pay you $150, which was the first month that had been paid and the $75.00 that was due on the end of the lease.

Q. You have occupied the premises during all of the time of that lease? A. I have.

Q. At the first meeting of creditors, you did not disclose that you had a lease upon the premises, did you?

A. I don't remember just which one of those meetings it was, Mr. Nealon.

Q. It was not until June 15, was it?

A. I don't remember when it was. The first time that it ever came up or that I was ever asked about it, I revealed the whole thing fully and completely, and at that time told you that whatever action you wanted to take toward the lease I would be very glad to comply with, except the payment of the $150, which I do not think you are entitled to and I do not think you are entitled to it now. [578]

Q. Now, in reply to your statement that you were ready to move out of the house or something to that effect, I told you, did I not, that I wanted to see the written lease before taking any action, didn't it?

A. I don't remember whether you did or not, Mr. Nealon.

Q. Well, wasn't there quite a little discussion—

The COURT.—It seems to me that this is a mighty small thing to squabble over now. You did not take possession of it. You could have seen the landlord and gotten possession, if he did not have a lease. You did not demand the premises. If he was waiting until he could find that lease, you did not care to take any steps until he found it, although you knew he was there—it seems to me that is too small a thing to fight over here now in court.

Mr. NEALON. — The amount is small, if the Court please, but the decisions are that we are entitled to the last month's rent, which is a deposit, whether we abandoned the lease or not. The abandonment of the lease does not constitute abandonment of the deposit for the security of the last month's rent. It was not up to me to do that and elect to take possession of the house in the middle of the summer, when the concealment of the existence of the lease up to that time had prevented my taking any action in the *soring,* when some values might be made of the lease.

The COURT.—That is pretty strong language to use "concealment of the lease."

Mr. NEALON.—It does not appear in the—

The COURT.—The very fact that a man occupies the premises is some notice to the world that he has some right to remain [579] there and then the creditor is put upon notice, if it comes to a question of that kind. It seems to me that there is so many important matters to be determined in this case that we are losing time with these small matters.

(Testimony of George W. Shute.)

Mr. NEALON.—I am skipping as many as I can, if your Honor please, from my viewpoint.

Q. Some time subsequent to the filing of your petition in bankruptcy, Judge Shute, you had recorded in the name of Mrs. Shute a declaration of homestead on the property at Globe, did you not?

A. You mean that I sent it forward for recordation?

Q. Yes, that it was recorded at your request.

A. Yes, I sent it forward for recordation, yes.

Q. When did Mr. Armstrong and Mr. Kramer waive their rights under the contract?

A. I don't remember just when that discussion came up.

Q. Before or subsequent to bankruptcy?

A. Well, I think it must have been right about that time. Just exactly the time, I don't remember, when that matter was discussed but it must have been right about that time.

Q. When was the new contract entered into?

A. What do you mean?

Q. The Armstrong, Lewis & Kramer.

A. The last one?

Q. The one after Judge Lewis' death.

A. I don't remember. The contract itself—

Q. That contract is in evidence here. The other contracts are not, except the two modifications of that one contract.

A. I don't remember the dates of them. [580]

Mr. NEALON.—Q. Wasn't that question decided

(Testimony of George W. Shute.)

at the time the contract was entered into almost immediately after Judge Lewis' death?

A. I don't remember, Mr. Nealon, when it was done. I know that there was some little question about it and I know there was some little discussion about it and it went along for quite a while, and just when it was done, I don't know.

Q. Now, Judge Shute, the evidence in the record shows that you had an income of $15,250.20 from Armstrong, Lewis & Kramer for 1927; an income from Mr. Goswick of approximately $3,000 and that you received from Miss Wentworth the sum of $995, making a total of $19,245.20—all of that for 1927. Now I have everything that you turned over to me available and I will ask you how you account for *for* the fact that after earnings of that amount in 1927 you had only about $290 to turn in to your creditors when you filed your petition in bankruptcy?

A. The statement here, Mr. Nealon, will show that just as minutely as anything can show it and it would be impossible for me to remember the different steps—different transactions from memory.

Q. What payments did you make in 1927 that would reduce your assets to that extent?

A. The little statement that has been filed here will show the facts — that was prepared by Mr. Lewis will give you a running picture of the whole thing.

Q. I call your attention to the fact that that statement excepting in very few instances, does not

(Testimony of George W. Shute.)

show the [581] disbursements or the purpose thereof, nor the income and that Mr. Lewis' testimony on the stand shows omissions therefrom. Can you make any further explanation than is made in that statement?

A. I will not attempt to, because I think that that clearly reveals just what the situation is. I spend a good deal of money. I used quite a little bit of money. I am drawn on quite heavily by friends and it all goes, it does not seem to me that it makes much difference how much money I make. There always seems to be a demand for it about two days after I get it.

Q. Did you pay any large indebtedness that year, other than the $2200 to the bank at Globe?

A. The statement will show just as nearly as can possibly be shown, Mr. Nealon, just how that money went.

Q. You know that, don't you, whether you did or not?

A. Mr. Nealon, I can't remember just what I did with the money and how I expended it and so on. Large amounts, you say. I don't know what you mean by large amounts.

Q. Is that the best explanation you can make?

A. That is the explanation I give you, sir.

Q. You sat in the case. Would that explanation have been satisfactory to you?

The COURT.—Oh, don't stop to argue that.

Mr. NEALON*S*.—During the year 1926, you re-

(Testimony of George W. Shute.)

ceived from the firm, according to the statements, $7827.45; according to your own testimony, $5,000 from Julian and I think—I am not sure of this—a thousand dollars from Mr. [582] Goswick, making $13,827.45. Can you make any further explanation of the deficiency in assets to meet your liabilities?

A. I think the little statement that has been prepared for that express purpose shows it far more nearly than I could even attempt to show it from memory.

Q. I hand you herewith the statement— I show you the check stubs, consisting of three packages there, together with the bank statements received from you or from your attorney, or from the bank, and ask you to point out where any of these reflect the source of your income during the periods covered thereby?

A. Mr. Nealon, if you will direct my attention to something, I will be very glad to answer that, but I don't know what you have in mind.

Q. I don't consider that my duty. It is your duty to make an accounting, as I see it, under this last amendment of 1926. I am producing all of the data furnished me by you and ask you to give such an accounting.

A. We have made the statement, and it is here on record. We have prepared it from the very data that you show me.

Mr. NEALON.—Your Honor will notice there—

(Testimony of George W. Shute.)

Mr. MOORE.—Q. You refer to Exhibit "A," Judge Shute? [583]

A. Exhibit "A."

Mr. NEALON.—There is nothing that a person can figure excepting a bank account from that exhibit.

The COURT.—Well, I notice here, Exhibit "A," receipts from Armstrong, Lewis & Kramer, rent, sources unavailable; receipts from Wentworth, Hudson car; receipts from Julian, Wesley Goswick, rents, loans. What is it that you want to know?

Mr. NEALON.—Receipts and disbursements, if your Honor please, and I can't get them from that. This was made up too, if your Honor please, long, long afterwards—after the specifications having been filed in here. At least, they were presented long afterwards. There are lots of items — the $750.00 borrowed from the bank, that is not shown here. There are any number of items that we know of and there may be many others.

The COURT.—It seems to me that you could easily call attention to the items that you know are omitted and say you know it and ask the witness.

Mr. NEALON.—But, you don't know whether those are all or not. I called Mr. Lewis' attention, I think, to those on the stand.

The COURT.—Well, I am not going to stay here for an accounting, Mr. Nealon.

Mr. NEALON.—But, I think it is the duty of the bankrupt to have furnished this accounting in court.

Now, if that is an accounting, why it is an accounting, but it is not, according to my contention. [584]

The COURT.—I meant to say that I can't stop this proceeding for the purpose of enabling you or the bankrupt, either one, to make an accounting here. He has answered your question. Now, it is a question of whether his answer is sufficient or whether your showing under your specification was sufficient to bar a discharge. I do not deem it the proper thing for the Court to sit here and make an account of every item of it that he has paid out in the last few years and it seems to me, if you have all of the records, that you can easily have an accounting to show what the records disclose.

Mr. NEALON.—But we haven't the records. That is, exactly what I am speaking about. We haven't the records that will show it. I could make the accounting myself if I knew that.

The COURT.—Well, what do the records that you have show to be lacking?

Mr. NEALON.—It shows many missing checks. They do not show the receipts. This is one of the grounds where the burden of proof falls on the bankrupt in the making of an accounting.

The COURT.—Well, you have heard the testimony that some checks are not available.

Mr. NEALON.—Now, he has stated that he has given us everything here. I will ask to introduce in evidence the books, the checks, the stub books and the bank statements, so that they may become a

part of the record in this case, and offer them as one exhibit, as everything that has been furnished to the trustee. [585]

The COURT.—Well, do you want the Clerk to copy them? I don't think it is a good thing to offer them as one exhibit, because that imposes too great a responsibility upon the Clerk.

Mr. NEALON.—Yes, kept tied up and put altogether. That is my idea of it. It would be too much to string them out through the court. It would take up too much time. Let the clerk make any identification he wants to. That is satisfactory to me, but I want to tender them in court as all that has been given to the trustee in the way of an accounting. If we should have to appeal, I would like to have it for the record, if your Honor please.

The COURT.—Well, you are entitled to introduce them if you so desire.

Mr. NEALON.—And I offer them in evidence.

Mr. MOORE.—No objection.

The COURT.—They may be admitted and, Mr. Clerk, you will make a memoranda showing of what the exhibit consists, so many pages of bank statements, so many packages of cancelled checks, so many deposit slips, if there are such, etc.

The CLERK.—No. 31.

The COURT.—Anything further?

Mr. NEALON.—Yes. We are just about through, if your Honor please. There may be a question or so. [586]

(Testimony of George W. Shute.)

The COURT. — Have you other witnesses for the—

Mr. MOORE.—I want to ask Judge Shute a few questions.

Mr. NEALON.—Might I ask one question before the witness is withdrawn?

The COURT.—I merely asked if the petitioner for discharge had any further witnesses.

Mr. MOORE.—No, sir.

Mr. NEALON.—Q. Judge Shute, I want to call your attention to your testimony given on May 1, 1928, this question and this answer. "Why did you want to give it to him, then?" You were referring to the mortgage that you had given to the First National Bank. And your answer, "At that time, I had in mind that I was going to fight this thing out. I wanted this money to clear up my debts as well as I could and I wanted to protect the car, so people would not be coming back on it. Yes, and after talking it over with older and wiser heads, they advised me not to fight it and I have followed their guidance." Did you so testify?

A. Yes.

Q. The next question, "You intended to put the car away so Mr. Mackay could not realize anything out of it?

A. I never thought of that at all. I knew he could not possibly touch it. It was furtherest from my mind. I made up my mind that he would never get a look-in." Was that your testimony?

(Testimony of George W. Shute.)

A. If that record so shows, that is what I testified to.

Mr. NEALON.—That is all. [587]

Redirect Examination by Mr. MOORE.

Q. In answer to Judge Nealon's question whether or not you knew, at the time that you stated on your examination before the referee, that you had received no large sums of money from any source other than Armstrong, Lewis & Kramer, you stated that at that time you knew that you had received from Julian and Goswick amounts totalling $9,000.-00, did you not? A. Yes.

Q. Please state whether or not, when you answered Judge Nealon's question, as indicated, you at that time had these two items in mind?

A. I was not asked about that. I knew that I had furnished the information, that is, I knew that my bank statements, my deposits and so on, would reflect this amount which I was being examined at length upon—little matters that would not appear in the result at all. I testified about that and would have answered freely and never would have hesitated about it at all, if I had been asked about that Julian transaction. It was a matter that was absolutely open and aboveboard. No reason why I should conceal anything. I thought that had come in and practically gone out within thirty days, the whole of it and more too.

Q. You have not answered my question as to

(Testimony of George W. Shute.)

whether or not, when you made that answer, you had these two items in mind.

A. No, I did not have them in mind when that answer was made. The answer was based entirely upon the examination that was made and every little item that was not shown or covered, that could have been ascertained from the stubs and the checks and the bank records that were then in Mr. Nealon's possession. [588]

Q. State whether or not you and Mr. England have ever yet had any settlement on the amount of this throw-back that you owed him and it was included in the amount of the indebtedness at the time the conditional sales was given on the car in controversy?

A. When the matter came up, after it had been threshed out, Mr. England told me that he would far rather give me the car than to be mixed up with it at all; that he should have instructed the bookkeeper to have carried this amount or should have been carried—not carry it as they carried the amounts of the transfer to the dealers, and he states "I would rather give you a new car than to be mixed up in it at all." I said: "You don't have to give me a new car. I will take the matter right up with the trustee, turn the car over to him and do what I see fit and you need not worry about it any more." That was what was done.

Q. The amount of the throw-backs on these cars had never been charged up to you in England's books? A. No.

(Testimony of George W. Shute.)

Q. In answer to one of Judge Nealon's questions, Judge Shute, you stated that Packard acknowledged an indebtedness to you and give *agout* 20% of the—10% of the option price on this quicksilver property. Do you recall that?

A. I believe I expressed it in that way. I should not have expressed it exactly like that, because Mr. Packard knew that I had had no contract with him or with Goswick over this. He knew that there had never been any discussion about as to what would be done with that deal at all.

Q. In that particular case—

A. He did not owe me anything. Neither one of them owed me anything on it and never had. [589]

Mr. MOORE.—Q. Judge Shute, were you employed by either Packard or Goswick or both of them to adjust the trouble which had arisen between them over this property?

A. I was not employed by either of them. There was no question of employment at all. It was simply a question of a settlement of a family difficulty by one who stood in a fair relation to both of them. There was no employment whatever.

Recross-examination by Mr. NEALON.

Q. Now, the Hudson car was charged to you at the net amount and not the retail price?

A. That is where the difficulty came, Mr. Nealon.

Q. So that there was no reason for putting in a throw-back on it?

(Testimony of George W. Shute.)

A. Why, that is the way the books show.

Q. The first car was a second-hand car, wasn't it, and there would be no throw-back involved?

A. That was a contract.

Q. Now, the Wentworth car was an entirely different matter and there was no throw-back involved in that? A. That was a special transaction.

Q. That was charged as a separate account and appears so here. So that, taking his own figures, there is no throw-back due on any of this or was not at that time was there? I show you his ledger account, so that you may examine them.

A. On the ledger account there isn't anything about it at all.

Q. Then, this existed only in your mind and in Mr. England's mind if it existed; is that right? [590]

A. That is a matter for the Court to determine from the testimony I have given covering that subject.

Q. Any written instrument showing it?

A. No written instrument showing it at all. Simply one of those transactions that come up between what I term a client and that he seems to consider rather a confidential relation as a friend and as his counsel. No reason on earth why Mr. England should lend his aid to a conditional sales contract that there was no foundation for entirely. There was a foundation for it, in fact. It was given in the very best of faith. It was carried on in the very best of faith. Testified to in the very

(Testimony of George W. Shute.)

best of faith and, if, in the end, according to the way these books were kept, he was willing to throw it off to get out of it, I would have been a very poor men indeed if I did not accede to his wish and his desire and surrender it without any fight at all, which I did.

Mr. NEALON.—If your Honor please, I omitted to offer, as a part of the cross-examination, the rest of the testimony given by Judge Shute before the referee, together with the exhibits attached. I am doing that, if your Honor please, so that there may be no confusion in the record.

The COURT.—It may be admitted; I have read it anyway.

Mr. NEALON.—And we want it as a part of the record and I think that probably this is a better time to speak of that—your Honor will, of course, preserve I take it, proper exceptions in regard to anything that you think proper in that record itself, if there be anything ruled out? [591]

The COURT.—My idea about it is that in a proceeding of this kind that you should not proceed in the same technical manner that we would were we trying the case to a jury and I take the record as I find it and I consider it as a whole. If there are any portions of it which you wish to move to strike out, why—

Mr. NEALON.—No, we want the whole thing in, if there is nothing that your Honor felt that you were going to strike out yourself.

(Testimony of W. W. McBride.)

The COURT.—There were some immaterial matters but I don't think that is hurtful. To strike it out would require more pains and trouble than to leave it there.

Mr. NEALON.—That is all. Just one moment. It might be somewhat in the interest of time, inasmuch as we have now introduced in evidence the entire testimony as given by Mr. Shute before the referee, it does not necessitate filing with the Court or with the opposing counsel the evidence that we introduced on the direct. That was all admissions as against interest. I don't see that that is material and would only encumber the record.

TESTIMONY OF W. W. McBRIDE, AS A WITNESS FOR TRUSTEE AND CREDITOR (IN REBUTTAL).

Direct Examination by Mr. NEALON.

Q. Mr. McBride, you testified yesterday morning, I believe, to a meeting with Wesley Goswick?

A. Yes, sir.

Q. Near Payson? A. Yes, sir.

Q. Did you fix the time and place of that?

A. Yes, that was on November 17, 1928. [592]

Q. Did you have someone accompanying you on that trip? A. Yes.

Q. What was it?

A. Mr. James C. Cline of Payson, Deputy Sheriff of Gila County.

(Testimony of W. W. McBride.)

Q. He is in the courtroom now or was here during this trial?

A. Yes, he is in the courtroom present.

Q. Did you at that time meet and have a conversation with Wesley Goswick? A. We did.

Q. Did, in that conversation, the question come up of an agreement between him and Judge Shute?

A. It did.

Mr. NEALON.—Q. Did he say to you that he had entered into a verbal agreement with Judge Shute to pay him 10% of the amounts received on the new contract with Foster, as they were paid him?

A. He did.

Cross-examination by Mr. MOORE.

Q. Did you make any memoranda of that conversation? A. I did immediately thereafter.

Q. And you have refreshed your memory from that? A. Yes, sir.

Q. Are you sure, Mr. McBride, that Goswick did not tell you that he had an agreement on the first deal and not the last?

A. At no time during our conversation did either Mr. Goswick or myself ever make any reference to any other contract other than the contract between him and L. E. Foster.

Q. State, as near as you can, just exactly what Goswick said. [593]

The COURT.—No, I don't think that is material. That is all, Mr. McBride.

(Witness excused.)

Thereupon it was stipulated by counsel that it was understood that the testimony given by A. E. England before the referee had been admitted in evidence.

Thereupon the case was closed.

Creditor's Exhibit No. 29, theretofore admitted in evidence, consisted of certified copy of complaint and answer in Cause No. 5431 in the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, William Stephens as Administrator of Estate of Mary B. Cullumber, deceased, plaintiff, vs. G. W. Shute, defendant. The first two paragraphs of plaintiff's complaint are as follows:

"I.

"That on the 1st day of November, 1909, Mary B. Cullumber, a resident of the County of Yavapai, Arizona, died intestate, leaving an estate consisting of real and personal property, situate, lying and being in said County and Territory. That thereafter the plaintiff herein duly filed his petition asking for letters of administration on the estate of said Mary B. Cullumber, and was, after a hearing in the Probate Court in and for said County, on March 1st, 1910, by an order of said court duly appointed such administrator of said estate, and that the [594] plaintiff on the 19th day of March, 1910, duly qualified by taking the oath of office and filing his bond as such administrator; that the plaintiff is now, ever since the 19th day of March, 1910, has been, the duly appointed, acting and qualified

administrator of said estate, and in the full discharge of his duties as such administrator. That the defendant is a resident of the City of Globe, County of Gila, Arizona Territory.

"II.

"That on the 18th day of October, 1909, thirteen days before the said Mary B. Cullumber died, she was the owner, in the possession and entitled to the possession of the following described piece and parcel of land, situate in the City of Prescott, Yavapai County, Arizona, to wit: Commencing at a point being the Southwest intersection of Gurley and Mount Vernon Streets in East Prescott, and running from said point south along said Mount Vernon Street on the west side to a point one hundred and fifty feet; thence west fifty feet; thence north one hundred and fifty feet; thence east to place of beginning. That said Mary B. Cullumber on said last-mentioned date, and up to the time of her death was the owner of said property in fee, deraigning her title from the United States by *mean* conveyances. That on the said 18th day of October, 1909, the said Mary B. Cullumber, deceased as aforesaid was, and for a long time theretofore had been a very sick woman both in body and mind; that she was then and for some time prior thereto had been confined to her bed because of said illness, and remained confined to her bed up to the time of her death. That by reason of her said sickness, her mind was weak and incapacitated to such an extent that she was not capable of knowing or compre-

hending what she was doing, and that on said day the defendant, fraudulently taking advantage of the incapacity, illness and weakness of mind of the said Mary B. Cullumber, procured her to sign a pretended deed of conveyance, purporting to convey to the [595] said defendant, the above described piece and parcel of land.

"That the said Mary B. Cullumber's mind was in such weakened condition because of her illness that she did not possess mental capacity to contract, and that said pretended deed was therefore absolutely void. Plaintiff further alleges that he is informed and believes, and therefore alleges the fact to be that said pretended deed was executed by the deceased without any consideration whatever, and that the defendant, and the wife of the defendant, Jessie M. Shute, the said Mary B. Cullumber being old and infirm, sick and incapacitated, visited her sick bed, and by profering aid, sympathy and comfort to the said Mary B. Cullumber, secured and exercised an undue influence over the said deceased, and while the said deceased was mentally incapacitated and under the undue influence of said defendant, and Jessie M. Shute, his wife, she was fraudulently induced to sign said pretended deed.

"That the plaintiff is credibly informed and believes the defendant makes some claim in and to said described premises adverse to the right, title and interest of the plaintiff as such administrator."

Then follows prayer asking judgment that pretended deed be declared null and void and canceled, that plaintiff be declared the owner and entitled to

the possession of the premises and his title thereto be established, and that the defendant be barred and forever estopped from claiming any right or title to said premises adverse to plaintiff, and for costs of suit.

A second cause of action adopts the first paragraph of the first cause of action, and then continues with paragraph II as follows:

"That on the 18th day of October, 1909, the said Mary B. Cullumber was the owner in fee, deraigning her title from the United States through mesne conveyances, and as such owner [596] entitled to the possession of the following described piece or parcel of land situate in the City of Prescott, Yavapai County, Arizona, to wit: Commencing at a point being the southwest intersection of Gurley and Mount Vernon Streets in East Prescott, and running from said point south along said Mount Vernon Street on the west side to a point one hundred and fifty feet; thence west fifty feet; thence north one hundred and fifty feet; thence east to place of beginning. That on the said 18th day of October, 1909, the said Mary B. Cullumber made and executed a certain instrument known and designated as a quitclaim deed purporting to convey to the defendant herein the aforesaid described piece and parcel of property, for the nominal consideration of Ten Dollars, with the understanding and agreement between herself and the defendant that said instrument should not take effect until after the death of the said Mary B. Cullumber, and that the said Mary B. Cullumber in the executing of said

instrument intended thereby to dispose of said property after her death, and it was not her intention or purpose to vest the defendant with the title to said property or any interest therein until after her death.

"That the plaintiff is credibly informed and believes, and so alleges the fact to be, that the defendant makes some claim in and to said premises adverse to the right, title and interest of the plaintiff."

The prayer is practically the same as in the first cause of action. Third and fourth causes of action are set up, the allegations and prayer for relief except as to description of property being identical with those of the first and second causes of action, respectively, except that the property is described as Lot 12 in Block 7 of Prescott, Yavapai County, Arizona, being 50x150′ in dimensions. Said pleading was signed by Ross & O'Sullivan, attorneys for plaintiff, and verified by H. D. Ross as one of the attorneys for plaintiff on the 28th day of October, [597] 1910, and is endorsed "Filed by the Clerk of the Court of Yavapai County at 2:00 o'clock P. M. October 28, 1910." The answer filed by Robt. E. Morrison, attorney for the defendant G. W. Shute, consists first of a demurrer on four separate grounds not here set out, and then answering to the merits as to the first cause of action, first admits all of the allegations contained in the first paragraph and then answers as follows: "Admits that on the 18th day of October, 1909, thirteen days before the said Mary B. Cullumber died, she was the owner

[598] and entitled to the possession of the property described in said cause of action. Denies that on said 18th day of October, 1909, or at any other time, the said Mary B. Cullumber, deceased, was or had been a very sick woman both in mind and body. Denies that she was then or for a long time prior thereto had been confined to her bed because of said illness, but alleges that on said day and for some time prior thereto she had been confined to her bed because of a physical illness and remained confined to her bed up to the time of her death. Denies that by reason of said or any sickness her mind was weak and incapacitated to any extent, and denies that she was not capable of knowing or comprehending what she was doing, but alleges that at all times up to the day of her death the said Mary B. Cullumber's mind was strong and that she was capable of comprehending and did comprehend everything that she was doing. Denies that on said 18th day of October, 1909, or at any other time, defendant fraudulently or in any other manner took advantage of any incapacity, illness or weakness of mind of the said Mrs. Mary B. Cullumber to procure her to sign a pretended or any deed of conveyance purporting to convey to this defendant the piece and parcel of land described in said first cause of action; but alleges that the deed described in said cause of action was executed and signed by said Mary B. Cullumber on said 18th day of October, 1909, of her own free will, and that her mental condition at said time was sound. Denies that said

Mary B. Cullumber's mind was in such a weakened condition because of her illness that she did not possess mental capacity to contract, and denies that said pretended deed was therefore absolutely void. But alleges that at the time of the execution of said deed by said Mary B. Cullumber she was entirely competent and qualified and did possess mental capacity to execute said deed. [599]

Defendant denies that said deed was executed to the defendant without any consideration whatever, but alleges that there was a good and valuable consideration for the making of said deed to this defendant, as will more fully appear hereafter in this answer. Denies that defendant and the wife of this defendant, or either of them, the said Mary B. Cullumber being old and infirm, sick and incapacitated, visited her sick bed and by proffering aid, sympathy and comfort to said Mary B. Cullumber, secured or exercised undue or any improper influence over the said deceased; and denies that while the said deceased was mentally incapacitated or under undue or any improper influence of said defendant and the said Jessie M. Shute, his wife, or either of them, she was fraudulently or in any improper way induced to sign said deed. Alleges that said Mary B. Cullumber at said time was not incapacitated to transact business affairs and make contracts, nor was she at said time under undue or any improper influence of defendant or Jessie M. Shute, his wife, And further alleges that defendant and his said wife did proffer aid, sympathy and comfort to said Mary B. Cullumber, but that by

reason thereof there was no undue or improper influence exercised over her at said or any time.

Admits that he does make some claim in and to the said described premises adverse to the right, title and interest of plaintiff as such administrator, and the character and nature of said claim will be more fully set forth hereafter in this answer.

As to the second cause of action set forth in said Complaint, and answering the second paragraph thereof, defendant

I.

Admits that on the 18th day of October, 1909, said Mary B. Cullumber was the owner in fee and entitled to the possession of the property described in said paragraph, and that on said day she made and executed a certain instrument known and designated [600] as a quitclaim deed, conveying to the defendant herein the said property; but denies that said conveyance was made for a nominal consideration of Ten Dollars, and denies that said conveyance was made with the understanding and agreement, or any understanding and agreement, between herself and this defendant that said instrument should not take effect until after the death of said Mary B. Cullumber; and denies that said Mary B. Cullumber in the executing of said instrument intended thereby to dispose of said property after her death; and denies that it was not her intention or purpose to vest the defendant with the title to said property or any interest therein until after her death; and alleges that said conveyance was so made for a good and valuable consideration greatly

in excess of said Ten Dollars, which will more fully appear hereafter in this answer; and alleges that at the time said Mary B. Cullumber executed said instrument, she intended that said instrument should take effect immediately upon its delivery upon said 18th day of October, 1909, when said deed was delivered to this defendant by said Mary B. Cullumber, and that it was her intention and purpose to immediately vest in this defendant the title to said property and all interest therein.

Defendant admits that he makes some claim in and to said premises adverse to the right, title and interest of the plaintiff, to wit: that he is the owner thereof by reason of the conveyance described in said cause of action, as will more fully appear hereafter in this answer.

As to the third cause of action and the second paragraph thereof, defendant

I.

Admits that on the 18th day of October, 1909, thirteen days before said Mary B. Cullumber died, she was the owner in fee and entitled to the possession of the property described in said paragraph. Denies that on the 18th day of October, 1909, or at [601] any other time, said Mary B. Cullumber was or for a long time prior thereto had been a very sick woman both in mind and body; and denies that she was old and decrepit and was then or for any time prior thereto had been confined to her bed because of her mental infirmities, and thereafter remained confined to her bed up to the time of her

death by reason of any mental infirmities. Denies that by reason of her said sickness her mind was weak and incapacitated to such or any extent that she was not capable of knowing and *and* comprehending what she was doing; and denies that on said day this defendant fraudulently or in any other improper manner taking advantage of the alleges incapacity, illness and weakness of mind of said Mary B. Cullumber, procured her to sign a pretended deed of conveyance purporting to convey to said defendant the land described in said paragraph. Denies that said Mary B. Cullumber's mind was in any weakened condition because of any illness or descrepitude, and denies that she did not possess mental capacity to contract, and denies that said deed was therefore or for any reason absolutely or in any manner void.

Defendant denies that said deed was executed to the defendant without any consideration whatever, but alleges that there was a good and valuable consideration for the making of said deed to this defendant, as will more fully appear hereafter in this answer. Denies that defendant and the wife of this defendant, or either of them, the said Mary B. Cullumber being old and infirm, sick and incapacitated, visited her sick bed and by proffering aid, sympathy and comfort to said Mary B. Cullumber, secured or exercised undue or any improper influence over the said deceased; and denies that while the said deceased was mentally incapacitated or under undue and sinister or any improper influence of said defendant and the said Jessie M. Shute, his

wife, or either of them, she was fraudulently or in any improper way induced to sign said deed. Alleges that said Mary B. Cullumber at [602] said time was not incapacitated to transact business affairs and make contracts, nor was she at said time under undue and sinister or any improper influence of defendant or Jessie M. Shute, his wife. And further alleges that defendant and his said wife did proffer aid, sympathy and comfort to said Mary B. Cullumber, but that by reason thereof there was no undue or sinister or improper influence exercised over her at said or any time.

Admits that he does make some claim in and to the said described premises adverse to the right, title and interest of plaintiff as such Administrator, and the character and nature of said claim will be more fully set forth hereafter in this Answer.

As to the fourth cause of action set forth in said Complaint and the second paragraph thereof, defendant

I.

Admits that on the 18th day of October, 1909, said Mary B. Cullumber was the owner in fee and entitled to the possession of the property described in said paragraph, and that on said day she made and executed a certain instrument known and designated as a warranty deed, conveying to the defendant herein the said property; but denies that said conveyance was made for a nominal consideration of Ten Dollars, and denies that said conveyance was made with the understanding and agreement, or any understanding and agreement,

between herself and this defendant that said instrument should not take effect until after the death of said Mary B. Cullumber; and denies that said Mary B. Cullumber in the executing of said instrument intended thereby to dispose of said property after her death; and denies that it was not her intention or purpose to vest the defendant with the title to said property or any interest therein until after her death; and alleges that said conveyance was so made for a good and valuable consideration greatly in excess of said Ten Dollars, which will more fully appear hereafter in this Answer; and alleges that at the time said Mary [603] B. Cullumber executed said instrument, she intended that said instrument should take effect immediately upon its delivery upon said 18th day of October, 1909, when said deed was delivered to this defendant by said Mary B. Cullumber, and that it was her intention and purpose to immediately vest in this defendant the title to said property and all interest therein.

Defendant admits that he makes some claim in and to said premises adverse to the right, title and interest of the plaintiff, to-wit: That he is the owner thereof by reason of the conveyance described in said cause of action, as will more fully appear hereafter in this Answer.

WHEREFORE, defendant having fully answered, prays that he go hence without day and with his costs.

ROBT. E. MORRISON,
Attorney for Defendant.

And for a further separate and other answer to said Complaint and each and every cause of action therein set forth, defendant alleges:

I.

That the Mary B. Cullumber, deceased, mentioned in said Complaint, was the aunt of the wife of defendant, Jessie M. Shute, who is mentioned therein, and also of Walter Smith, a brother of said Jessie M. Shute, and of Arthur Small and Adah Small, the step-brother and sister, respectively, of said Jessie M. Shute; the said Adah Small being now married and her name being now Adah Gillespie. That at all times during the life of said Mrs. Mary B. Cullumber the relationship between her and the said Jessie M. Shute and Walter Smith was more like mother and children than like aunt and niece and nephew.

II.

That for many years prior to the death of said Mary B. [604] Cullumber, said Jessie M. Shute resided with her in the City of Prescott and the said Mary B. Cullumber was almost entirely without means for her support. That said Jessie M. Shute secured employment in various capacities and for three years was a teacher in the Normal School at Tempe, Arizona, where she resided with the said Mary B. Cullumber and the two children Arthur and Adah Small, and as this defendant is informed and believes gave to said Mrs. Mary B. Cullumber her entire earnings for her support, which earnings were put back into the Prescott property described

in said Complaint, after the deduction of their living expenses. That this continued until the marriage of said Jessie M. Shute to the defendant several years ago. That shortly after said marriage the said Mary B. Cullumber came to the town of Globe, the residence of this defendant and his wife, and resided with them several months and then returned to her home in Prescott, and shortly after this the said Mary B. Cullumber began writing to defendant and his wife, telling how hard it was to make both ends meet, that her property in Prescott, being the same described in the Complaint, rented poorly, and that the expenses, taxes, assessments and other matters in connection with said property kept her in such financial condition that she had very little to live upon. That this defendant and his wife continued from time to time to send to said Mary B. Cullumber sums of money for her support and clothing, and that this continued on down to the summer preceding the death of said Mary B. Cullumber, and that during said last-mentioned summer defendant and his wife sent to said Mary B. Cullumber Fifty Dollars to pay her way to Los Angeles, where she met the wife of this defendant and was supported by her while she remained in Los Angeles. That at that time in Ocean Park, California, said Mary B. Cullumber stated that she could not manage to keep her property expenses up; that the city was demanding the installing of a sidewalk which she was unable to [605] have done, and she then requested the wife of this defendant to take the property and put in this side-

walk and assume the management and ownership of the said property. That the said Mary B. Cullumber then returned to Prescott and shortly thereafter defendant and his wife were advised that the said Mary B. Cullumber was in a low state of health, and that said defendant and his wife immediately left for Prescott and found the said Mary B. Cullumber at the Mercy Hospital in Prescott. That on the day after their arrival in Prescott, the said Mary B. Cullumber repeated to this defendant what she had stated to his wife the previous summer, to-wit: that in her old age she could do nothing with the property, that she was unable, and has been unable the whole preceding summer to do her ordinary household duties, and stated that it was her desire to stay with the defendant and her niece, the wife of said defendant and her said nephew Walter Smith, as she chose, and that she would deed to this defendant her property in Prescott, being the same property described in the Complaint herein, if he would attend to the construction of said sidewalk in front of said property, and she be given a home as above set forth; and that in this way she could compensate this defendant and his wife for moneys which they had paid her, off and on, during several years prior thereto for her support and benefit, and at this time she spoke of the tender and loving way in which the wife of this defendant had for many years cared for and aided her, both by her affection and with money which the said wife of this defendant had earned and paid over to her. That thereupon, this defendant, his wife being present

during all of said conversation, agreed to the proposition made by said Mary B. Cullumber, above stated, and at her special request the deeds described in the Complaint herein were prepared and presented to the said Mary B. Cullumber for her signature, and she, knowing the contents of said deeds and that the same transferred the title of [606] the property described therein to this defendant, being the same property described in the Complaint herein, signed, executed and acknowledged the same in the presence of and before Allen Hill, a Notary Public of Yavapai County, Arizona Territory. That from the time of this defendant's arrival in Prescott as above stated, and during all the time thereafter and when the said Mary B. Cullumber signed and executed said deeds, she, the said Mary B. Cullumber, although physically weak, was mentally strong; that her mind was sound and clear and she understood what she was doing in signing the said deeds, and that at said time she had full capacity and was capable in every way of transacting business, making contracts, and especially making the deeds described in the Complaint, and that said Mary B. Cullumber continued in a sound and capable mental condition to within a week of her death. That upon the making and execution of said deeds and the acknowledgment of the same before said Notary Public, the said deeds were delivered by said Mary B. Cullumber to this defendant, were received and accepted by him, and thereupon the title to said property immediately passed to this defendant and has continued to remain in

this defendant from said time down to the date of the making of this Answer.

III.

Defendant further alleges that at the time of the making and delivery of said deeds to him, it was the intention of said Mary B. Cullumber that the title to said property should immediately pass to him, and that there was no understanding or agreement of any character between said Mary B. Cullumber and this defendant that the title to said property should not pass until after the death of said Mary B. Cullumber.

IV.

That while the consideration named in each of said deeds is the sum of Ten Dollars, the actual consideration was for [607] and on account of large sums of money paid over by this defendant to said Mary B. Cullumber for her support, and also by the wife of this defendant for a like purpose, and a further consideration was the love and affection between the wife of this defendant and the said Mary B. Cullumber.

WHEREFORE, this defendant prays judgment that the deeds described in said Complaint were made and executed by said Mary B. Cullumber while she was in a sound mental condition and for a good and valuable consideration, and that no undue or improper influence was exercised over the said Mary B. Cullumber by this defendant or his said wife, and that said deeds were properly and

legally made, executed and delivered to this defendant by said Mary B. Cullumber, and that thereupon this defendant became the owner of the property described in plaintiff's Complaint; and that he have judgment for his costs and such further relief as to the Court may seem meet and equitable in the premises.

ROBT. E. MORRISON,
Attorney for Defendant.

Territory of Arizona,
County of Gila,—ss.

G. W. Shute, being first duly sworn, deposes and says, that he is the defendant in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the denials and allegations of fact therein stated are true in substance and in fact, except as to those matters stated on information and belief and as to those he believes them to be true.

G. W. SHUTE.

Subscribed and sworn to before me this 29th day of November, A. D. 1910.

[Seal] ROSE McGRATH,
Notary Public.

My commission expires March 7th, 1914. [608]

Said answer shows service accepted by Ross & O'Sullivan, attorneys for plaintiff, December 2, 1910, and that it was filed by the Clerk of the Court on December 3, 1910.

Creditor's Exhibit No. 30 admitted in evidence consists of a warranty deed from G. W. Shute and

his wife, Jessie M. Shute and Arthur Small, all of Globe, Gila County, Arizona, and Adah Ray Gillespie, formerly Adah Ray Small, of Los Angeles, California, to John H. Robinson of Prescott, Arizona, conveying for a consideration of $1500.00 property in the city of Prescott, Yavapai County, Arizona, described as follows: Commencing at a point being, the S. W. intersection of Gurley and Mount Vernon Streets in said city of Prescott, running thence south along the west side of Mt. Vernon street to a point 150 feet, thence west at right angle to the said Mt. Vernon St. 150 feet thence east along the south side of Gurley street 50 feet to the point of beginning. Said deed is dated October 4, 1916. Acknowledgments follow. [609]

ifTRANSCRIPT OF TESTIMONY OF BANKRUPT GIVEN BEFORE REFEREE IN BANKRUPTCY.

Before Honorable R. W. SMITH, Referee in Bankruptcy.

(Title of Court and Cause.)

The first meeting of creditors in the above matter was held at the office of the referee in bankruptcy, in Phoenix, Arizona, at the hour of 10:30 o'clock A. M. Tuesday, May 1st, 1928, there being present the bankrupt, George W. Shute, his attorney, Orme Lewis, Esq., and Miss Alice M. Birdsall, representing the claim of J. J. Mackay.

The REFEREE.—The claim of J. J. Mackay in the amount of $31,343.81 being the only claim filed,

represents a majority in number and amount of claims, and will therefore be entitled to name the trustee. Whom do you wish to name as trustee, Miss Birdsall?

Miss BIRDSALL.—I nominate Mr. Thomas W. Nealon, as trustee.

The REFEREE.—Do you wish to have the trustee present?

Miss BIRDSALL.—I think he should be present.

Further proceedings await the arrival of Mr. Nealon, who is present during the remainder of the hearing.

Miss BIRDSALL.—I do not know what is customary in fixing the amount of the bond, as to what the amount should be.

The REFEREE.—The assets shown in this matter amount to $250.00, above exemption. I should think $500 would be ample; I will fix the amount of the trustee's bond at $500.00. [610]

Miss BIRDSALL.—I would like to make a motion before the examination begins. On page 3 of the schedule in which the claim of Mr. Mackay is listed,—this is not made in conformity with the Bankruptcy Act. The Act requires a statement as to the nature of the claim, and the consideration, whether a promissory note, judgment, etc. The Bankruptcy Act is quite specific about this matter, and I move to have the Schedule amended to conform to the Bankruptcy Act.

The REFEREE.—The nature of the indebtedness should be shown. The bankrupt can amend

(Testimony of George W. Shute.)
that,—it is page 3 of Schedule "A"—to conform to the requirements of the Bankruptcy Act.

TESTIMONY OF GEORGE W. SHUTE, BANKRUPT.

GEORGE W. SHUTE, the above-named bankrupt, was duly sworn by the referee, and gave the following testimony.

(Examination by Miss BIRDSALL.)

Q. Mr. Shute, in this claim you have scheduled, some thirty-one thousand odd dollars as due Mr. Mackay; what is the nature of that claim?

Mr. LEWIS.—I don't think it is important to go into that, since it is admitted.

Miss BIRDSALL.—It is very important to us.

A. It is a promissory note.

Q. Owing by you to Mr. Mackay.

A. The schedule so states.

Q. That amount is due by you to Mr. Mackay?

A. According to the note, yes.

Q. In the suit which Mr. Mackay filed against you, a copy of the complaint in which suit is hereto attached, it is charged that you received the consideration for [611] the original note of $20,000; is that true?

A. Well, that is rather a hard matter to answer, yes or no. I received a consideration—

Q. The original consideration was $20,000, was it not?

A. That is what the petition states; my under-

(Testimony of George W. Shute.)

standing is that it was $17,000, if I remember correctly, as a consideration for the whole transaction, which was stock.

Q. You state that the consideration was stock; was that the original consideration?

A. No, the note was given for the purpose of obtaining the purchase price for the stock.

Q. That was obtained from the Gila Valley Bank, was it not? A. Yes.

Q. That money was paid over to you by the Bank? A. No.

Q. How was it paid? A. I don't know.

Q. You state some stock was bought; what stock was that? A. Iron Cap.

Q. How much? A. A thousand shares, I think.

Q. Who did buy the stock?

A. I don't know; I don't know whether it was bought by Mr. Mackay or not.

Q. No orders were placed by you with the Wilson Brokerage Company?

A. I don't recall who placed the order. It was placed by Mr. Mackay or the Bank; I don't know which, but I would prefer to say it was the bank.

Q. You are sure you did not place any order yourself?

A. I am as sure as a person could be of anything after that lapse of time; I have no recollection of it now. [612]

Q. Did you ever buy any Iron Cap stock yourself, outside of that?

A. I believe I did, a small block; I don't know,

(Testimony of George W. Shute.)

the exact amount; it was just immediately before or immediately after that.

Q. That had nothing to do with the stock pledged as security for this note?

A. No, that was separate altogether.

Q. Do you remember the year? A. No.

Q. Do you remember the amount?

A. No, but it was a small block,—perhaps $1100, $1200 or $1300; some such amount.

Q. For how many shares?

A. I would say about a hundred shares.

Q. That was never pledged as collateral to this note? A. No.

Q. At the time of the giving of this note and subsequent thereto, did you receive dividends from the stock pledged to the bank? A. Yes.

Q. How much?

A. Well, I will again have to say that my memory is a little faulty, but I think it was paying 75¢ a share in dividends.

Q. Monthly, or quarterly, or how?

A. It seems to me it was quarterly, but it may have been monthly.

Q. The dividends were large, then?

A. They were very large for a while; they finally dropped to 50¢; then to 25¢, and finally was eliminated altogether. That is my recollection of it. [613]

Q. You received these dividends? A. Yes.

Q. This amount was not paid on the indebtedness of the Bank?

(Testimony of George W. Shute.)

A. Part of it was; I forget how much, but it was paid on the interest.

Q. Do you recall the amount? A. No.

Q. Can you give it approximately?

A. Well, I think the interest was paid in full on the note out of the first, second and probably the third dividend at that time.

Q. For how long a term would it pay for?

A. That would depend entirely on when the dividend came in; if monthly, the interest was paid monthly; I cannot remember it very clearly.

Q. Do you think it paid a year's interest on the note? A. No.

Q. Merely a few months, you mean?

A. I think so; those dividends dropped off very quickly.

Q. Have you any record books showing this transaction?

A. No, I kept no books of it at all; just what was kept at the bank; I have no record of it myself.

Q. What became of the stock eventually?

A. I don't know.

Q. Presumably it was sold by the bank?

A. I presume so; it was pledged to the bank as collateral.

Q. Regarding the assets which you have scheduled, I notice here "Real Estate in Globe of the estimated value of $250.00." Is that vacant property? A. Yes. [614]

Q. Where is that located? As regards streets?

A. It is between Sycamore and Oak, the street

(Testimony of George W. Shute.)

that goes up past the courthouse; it lies in the canyon after the road goes up over the hill.

Q. Is it back of Mr. Fisk's property?

A. It is much further up the *wash* than the Fisk property.

Q. Could it be sold for $250.00?

A. I doubt it, now; there is very little demand for anything of that kind at the present time.

Q. You scheduled no other property in Globe?

A. No, there is no other property there except the place we lived in at Sycamore and First.

Q. That is in Mrs. Shute's name?

A. That is her property; she got it about 1919.

Q. Was it purchased with her own funds?

A. It was purchased with funds she obtained,—except for a very small balance—from the sale of some property she had at the corner of Gurley and Mount Vernon Streets, in Prescott.

Q. That was her property there?

A. That was her separate property.

Q. This balance that you speak of, outside of what she received from the sale of this property in Prescott, what was that?

A. That was paid partly by myself and partly by her out of money she had saved out of her housekeeping allowance; it is not all paid yet.

Q. How much is still due?

A. I am not certain; I should say approximately $700 to $1,000. [615]

Q. Then at the time of the payment of this balance made by you and her out of her housekeeping

(Testimony of George W. Shute.)

money, that was subsequent to the incurring of the indebtedness to Mr. Mackay, was it not?

A. I think so; I think this transaction with the Bank was in 1917, or it might have been 1918, and I think the property was purchased after that.

Q. Then the amount you paid in was from community funds?

A. Yes, that would be community funds.

Q. What was the amount, approximately.

A. Well, it is pretty hard for me to say; it was paid in little small amounts from time to time, and I don't know; I think I could probably get the amount, however.

Q. What is the value of that property?

A. Well, I don't know, exactly.

Q. What do you consider the property worth at the present time, just approximately?

A. I should say $5,000.

Q. Of the amount of the purchase price for this property, do you think you paid as much as $1,000?

A. Yes, I think I did?

Q. More than that?

A. I might have paid a little more than that.

Q. As much as $2,000? A. I don't think so.

Q. You say there is some indebtedness on it at the present time? A. Yes.

Q. Do you know the amount?

A. Between $700 and $1,000.

Q. To whom is that owing?

A. Mary E. Holmes.

Q. Does she live in Globe? [616]

(Testimony of George W. Shute.)

A. No, she lives in Massachusetts.

Q. This indebtedness is represented by mortgage?

A. Yes.

Q. Did you ever convey to Mrs. Shute your interest in that property? A. No.

Q. Have you never made a deed to your interest in it? A. No.

Q. Your household furniture, etc., that you have scheduled here; where is that located? A. Here.

Q. Where are you living now?

A. At #66 W. Lynwood Street.

Q. You don't own that property there?

A. No.

Q. Does Mrs. Shute own it? A. No, we rent it.

Q. Your law library that you have scheduled for $750; where is that located?

A. In my office in the National Bank of Arizona Building.

Q. I notice you do not schedule any book accounts in your profession as an attorney; have you any accounts due you, in any way, shape or form?

A. That depends entirely upon the terms of my partnership agreement; the agreement takes care of that.

Q. You do not schedule any interest as a partner; are you a partner? A. Yes.

Q. What are the terms of your partnership?

A. I have a copy of the agreement in my pocket if you want to see it. [617]

Q. I would like to see it.

(Agreement handed to counsel.)

(Testimony of George W. Shute.)

A. I may say here that he have offered our house in Globe for sale for $5,000, but have never been able to obtain it.

Q. This partnership agreement was entered into about a year ago? A. The date shows it.

Q. Then you have an interest in all business coming in to the firm since that date? Did you have any interest prior to that date?

A. Prior to that agreement, you mean? Well, when I went in that was an old firm, and they had a lot of business that was overlapping; they put me in on that date on an equality with all the business; in other words, the business coming in then, I got my share, and my understanding was that if I went out of the firm, my income would cease at that date; they figured that this would take care of the business overlapping at the beginning.

Q. When did you enter into the prior agreement?

A. I don't remember.

Q. You came here in January, 1923, did you not?

A. Yes.

Q. You were on a salary then? A. Yes.

Q. How much was that? A. $5,000.00.

Q. How long did that arrangement continue?

A. One year.

Q. At the end of that time you became a partner?

A. Yes. [618]

Q. Then your partnership agreements have extended from January, 1924,—various agreements?

A. That is my understanding, or my recollection.

(Testimony of George W. Shute.)

Q. Since that time how much have you received from the firm's business?

A. Well, I can only give an approximation, but I think it is pretty close. I think the first year I received about $5500; that was 1924; in 1925 I received between $5500 and $6,000; I think in 1926 it was about $8,000; I think the last year I received somewhere in the neighborhood of $10,000; that is about right, I think.

Q. You have no books available?

A. The firm books show my earnings.

Q. You scheduled no cash in banks except $15.67; is that right? A. On that date, yes.

Q. That was on the date the schedule was filed?

A. Yes.

Q. How much have you drawn from the firm since the first of the year?

A. I think about $500 a month; there has been no dividend in April.

Q. At the time you made this petition, had you drawn the money coming to you up to the first of April?

A. No, I don't think I had; I think there was a little difference between the last dividend and the date of the dividend.

Q. These dividends are declared monthly, are they?

A. No, they are declared when the money comes in; sometimes there are two or three dividends in a month, and then sometimes there will be only one in two or three months. [619]

(Testimony of George W. Shute.)

Q. In addition to the dividends there is always a considerable amount on the books, isn't there, of business accr*y*ing?

A. I suppose there might be; I don't know. Fortunately for us, most of our clients pay very promptly; there are some who hang over, but not a great many.

Q. Of this amount that you have been receiving since you came here in 1923, how much have you expended?

A. In very many different ways. Living expenses are very high.

Q. How much do they run?

A. Well, we pay $75 a month rent; then there is the water, lights, gas, etc., Mrs. Shute takes care of the household expenses; I give her a certain amount, or an un*d*ertain amount,—and she pays them out of that.

Q. How much would you say, approximately?

A. I would rather not say, because it would only be approximately, but I should say somewhere around $200 a month, to $250.

Q. If you have been drawing approximately $500 a month what have you done with the balance?

A. I think I have drawn practically all of it by check and my check stubs would show that; they would answer that question better than I could.

Q. Has it been expended in investments?

A. No, I don't believe I have expended any of it in investments; most of it has gone to the payment of accounts.

(Testimony of George W. Shute.)

Q. You mean in the payment of past indebtedness? A. Yes.

Q. What amount of past indebtedness have you taken up since you came to Phoenix? [620]

A. I have taken up about $2200 or $2300 of the Old Dominion Bank.

Q. How much did you owe them?

A. I owed them about $3,000.

Q. They made you a discount?

A. Yes, the difference between what I owed and what I paid; I paid them between $2200 and $2300.

Q. What other accounts did you owe?

A. Well, I can't answer that offhand; of course these larger amounts stand out in my mind.

The REFEREE.—Did you owe any other bank?

A. No, I don't believe I did.

(Examination by Miss BIRDSALL Resumed.)

Q. What other large amounts do you recall that you owed?

A. I don't recall any other large amount just now.

Q. Was all of this indebtedness in Globe, or some of it in Maricopa County?

A. Practically all of it in Globe. I have not incurred any bills in Phoenix to amount to anything, except current bills.

Q. You have not made any investments in that time? A. No, I don't think of any.

Q. Have you any interest in any property in Globe, direct or indirect, outside of the interest you have in this house you mentioned?

(Testimony of George W. Shute.)

A. Nothing except what I have described.

Q. You have no interest in any mining property?

A. None at all.

Q. Any mining claims? A. No. [621]

Q. Have you represented any companies over there in any way as counsel from whom you have received fees since being in Phoenix?

A. I cannot think of any; it would be on the books here if I have.

Q. You have received nothing that would not show on the books of Armstrong, Lewis & Kramer?

A. I don't think so.

Q. From Globe companies or from interests you have there? A. I don't think so.

Q. You have a car at the present time, have you not?

A. I bought a car when I came down here, a Hudson, from my brother-in-law, and I paid $100 a month on it until it was paid for; then I traded it in on another car, from England, and then traded that in on another one, which is the car I have now; there is probably $1,000 due on it; it hasn't been carried in a finance company; he carried it.

Q. When did you purchase that?

A. If I remember right it was in October of last year.

Q. What was the purchase price? A. $1765.00.

Q. What did he allow you on your old car?

A. It seems to me he allowed me about $600.

Q. That would leave about $1150 due on the car?

A. About that.

(Testimony of George W. Shute.)

Q. Have you paid anything on it since?

A. Some small amounts; that has been covered mostly in work I did for him; that is why it is hard for me to say what the amount is.

Q. You have some interest in it at the present time?

Q. Well that depends on the conditions of the sale contract. [622]

Q. You did not schedule it?

A. I turned it back.

Q. The car is not in your possession?

A. No, I turned it back to England.

Q. I notice by the records that on the 7th of April, the day this complaint was served on you, you made a chattel mortgage covering that car with the National Bank of Arizona for $750.00. What was the nature of that loan?

A. I don't know just what you mean.

Q. What became of the $750?

A. There had been no dividend coming in; the bills were due and I borrowed this $750 from the bank to pay my expenses; I have a record of what I spent it for.

Q. You did that to cover other indebtedness?

A. As far as I could.

Q. You preferred other creditors, then, to Mr. Mackay? A. No, not at all.

Q. You used this to pay indebtedness?

A. I paid current bills, for rent, water, lights, etc.

Q. That did not take $750?

(Testimony of George W. Shute.)

A. That and the other matters I paid did.

Q. You still owe the bank $750? A. I do.

Q. Why didn't you schedule that?

A. Because I didn't propose to have the bank take any loss.

Q. But you do owe the bank?

A. I owe it $750.00.

Q. When you took your oath that this was all you owed, it did not include this, then; it was not entirely true? [623]

A. I did not so understand it.

Q. The oath says you are to schedule every debt?

A. I did not understand it was necessary for me to schedule every debt; I understood that was a matter for the creditors themselves.

Q. Is this schedule incorrect in any other particulars as representing your assets and liabilities?

A. I think it is. I think there is a little block of stock in the New Dominion, about 700 shares, I think; I have mislaid or lost the certificate, but I think I own a little block of stock.

Q. The records of the New Dominion would show that, wouldn't they?

A. I have some doubt about it for this reason. This block of stock was obtained as a fee; that block of stock was presumably broken up and each member received his share; we treated it as cash; I don't know whether it was issued to me in person, or to some other member of the firm, but I think it was probably issued to me, inasmuch as I handled the whole transaction.

(Testimony of George W. Shute.)

Q. The books of Armstrong, Lewis & Kramer office would show that?

A. Yes, that would straighten it out; they might even show just how it was handled.

Q. Are there any other matters in this schedule that are incorrect? A. Not that I know of.

Miss BIRDSALL.—I move that the bankrupt be required to amend his whole schedule to conform to the act. He says he did not have to schedule all of his debts; it is my understanding that he does. [624]

A. You asked about any other large amount I paid. When my father was sick I gave mother about a thousand dollars; then at another time I gave her a hundred, and then another hundred; that would be $1200.00.

Q. When did you pay that?

A. About a week or ten days before my father died; he died about the 15th or 16th of September, 1926; I gave her the $1,000 and the two amounts of $100 each later.

Q. Can you think of any other large amounts you paid since coming to Phoenix?

A. No, I cannot think of any others just now.

Miss BIRDSALL.—I would like to have this meeting continued until the books can be gone over, as these things will have to brought in.

The REFEREE.—I think it would be better to file an entirely new schedule, as this is short; have it include these omissions.

(Testimony of George W. Shute.)

(Examination resumed by Miss BIRDSALL.)

Q. Of this $750 you borrowed, you paid Mr. Lewis $100?

A. I am not sure; that may have come out of a subsequent dividend.

Q. You have received one dividend since this was made?

A. No, I cannot tell whether the last dividend was on February 28th or April 2d, but it was one or the other.

Q. Have you carried any other bank accounts in the last several years, other than the one in the National Bank of Arizona? A. No. [625]

Q. You have no bank account in Globe?

A. No.

(Examination by THOMAS W. NEALON, Trustee.)

Q. The law provides that your books are to be turned over. Have you any personal books of account showing your income?

A. Those books are all kept by the firm.

Q. You keep none individually? A. No.

Q. You have no books showing receipts from the firm and personal disbursements.

A. That is carried on the books of the firm. Then as I am paid I ordinarily give enough to Mrs. Shute to take care of the household expenses and deposit the balance and check it out.

Q. And you have no books showing your receipts and disbursements?

A. None except as I have told you.

(Testimony of George W. Shute.)

Q. You have nothing to show the amount of your receipts and deposits?

A. No, the deposit book would not show that correctly, but the Armstrong, Lewis & Kramer books will show.

Q. The firm books will show everything that you have received?

A. Yes, that is my source of income.

Q. From what books of account will your personal disbursements show?

A. They will only be shown by the checks I have drawn on my account.

Q. Will your checks or stubs show the persons to whom the amounts were paid and the purpose for which they were paid? [626]

A. They might not show the purpose. I put on the amount, the number of the check and the name; but there is hardly a one I would not remember what it was for.

Q. Have you the stubs? A. Yes.

Q. This property in Globe you mentioned, is the deed of record?

A. Yes, and I think I have the old deed.

Q. You list $100 as paid to Mr. Lewis for professional services in connection with this bankruptcy matter. Am I to understand that just prior to the filing of this bankruptcy schedule you had in the bank the sum of $115.67?

A. No, I hardly think that *toulw* be correct, as I paid Mr. Lewis in cash.

(Testimony of George W. Shute.)

Q. Then your checks will not be a complete account of your disbursements?

A. There may be a little deviation, but very little.

Q. Your schedule is dated the 17th of April. Your last dividend was how long before that period?

A. I cannot tell you exactly, but I should say a couple of weeks.

Q. At that time did you draw your part of all the fees collected?

A. I didn't draw it, if you mean I could go and make application for it. We don't do it in that way. These dividends are declared as the money comes in; it is really the bookkeeper who makes the distribution.

Q. You list no accommodation paper?

A. I am on no accommodation paper.

Q. There is no liability on notes or bills discounted? A. No. [627]

Q. Now this J. J. Mackay claim,—I believe you stated that you did not know by whom the order for the stock was placed at the time of its purchase?

A. That is right.

Q. Do you know through what broker it was purchased?

A. No, only by presumption; there was only one brokerage firm there, and that was Wilson & Company.

Q. You personally gave no order?

A. My recollection is that I did not.

Q. Do you recall whether you gave any order for the sale of it? A. I know I did not.

(Testimony of George W. Shute.)

Q. When you received the consideration for the note, was it placed to your credit in the bank?

A. No.

Q. It never became a part of your account?

A. No.

Q. It was never placed in your hands in money?

A. No.

Q. You never received the consideration into your hands? A. No.

Q. Do you know by whom that transaction was handled at the bank? A. Yes.

Q. Who was it? A. Mr. Mackay.

Q. You did not go with him to the bank?

A. No.

Q. Did he bring you any receipted vouchers in connection with it? Anything showing the consideration to you? A. No. [628]

Q. Was any receipt given for the stock held by them? A. I don't think so.

Q. Do you recall whether you signed the note in the usual form for that obligation?

A. It was in the usual form.

Q. Did it carry a pledge sale clause?

A. It may have, but I don't think so.

Q. Do you recall the circumstances of the sale at all?

A. No, I know nothing at all about the sale.

Q. Did you know anything about the sale prior to it?

A. I didn't know anything at all about it.

(Testimony of George W. Shute.)

Q. You were not notified before any sale of the pledge was made?

A. No, I don't know of my own knowledge that the sale has ever been made.

Q. Do you recall whether the note you signed at that time recited anything about the collateral being pledged? A. No.

Q. You think it was the ordinary form of collateral note? A. That is my recollection.

Q. After the sale was made, did you receive from the bank any statement of the sale and the balance?

A. I never received a statement.

Q. And you never received a statement from any broker afterwards? A. No.

Q. So that unless the authority to sell was in the note itself, there was none given by you for the sale of the stock? A. No. [629]

Q. You list state and county taxes on the property located at Globe as approximately $45.00; was that for one or more years?

A. That was for three years, I think.

Q. Does it include the taxes alone on that piece of property, or are other taxes included?

A. I don't think so.

Q. Then the $45.00 represents taxes on that one piece of property?

A. I think nothing else is included; I may be in error in that, but I don't think so.

Q. You will understand, Mr. Shute, that this examination is merely for the information of the trustee? A. I understand.

(Testimony of George W. Shute.)

Q. Your copartnership agreement in the law firm of which you are a member is dated the 2d day of May, 1927; was that the actual time of the agreement between you, or was it made prior to that time, and just then reduced to writing.

A. I think this was the agreement which was entered into immediately after Judge Lewis' death; it was to take effect from the 1st of April, 1927.

Q. Since the first of April, 1927, there must be a considerable amount of fees due the firm which have not yet been collected, must there not?

A. There are some, I presume.

Q. Can you give us an idea of the approximate amount?

A. I have never examined the books. We have a most excellent bookkeeper; she takes care of those things, and they are checked by Mr. Armstrong and Mr. Kramer. [630]

Q. Is it customary to furnish the members of the firm with statements? A. Yes.

Q. Do you recall ever having received any since the date of this agreement? A. Yes.

Q. Have you those in your possession now?

A. Yes.

Q. Will you furnish them?

A. I will be glad to; our bookkeeper will furnish you with a complete list of them if you wish; she strikes a balance every three months, I think.

Q. I would like to have the first, if any, that have been rendered to you, and I may call upon you for the others later. Now on the 1st of April, 1927,

(Testimony of George W. Shute.)

there was a balance sheet prepared showing the assets of the firm of Armstrong, Lewis & Kramer, of which you were then a member. Is that true? I mean the old firm, at or about the time the firm was dissolved.

A. I think it must be true; it seems to me there was a report about that time.

Q. If you have that in your possession I would like to have a copy of it. I mean *the that* was rendered to you personally. A. I see.

Q. What was your interest in the old firm, the percentage interest, I mean.

A. It seems to me that the first agreement was one that called for 12½%; then it seems to me there was a subsequent one calling for 15%, and then this one.

Q. Were these in addition to a salary?

A. No. [631]

Q. Prior to your becoming a member of the firm you were on salary, you stated? A. Yes.

Q. After that you went on a percentage basis?

A. Yes.

Q. Might I ask, merely for purposes of comparison, what was Judge Lewis' percentage in the old firm?

A. I think 35%; it was 36% at the time of the dissolution and of his death.

Q. My information is that the inventory filed in the estate of Judge Lewis called his interest in that firm worth the sum of $30,000; do you know whether that is correct? A. I don't know.

(Testimony of George W. Shute.)

Q. Do you know whether that would represent a fair value of his interest in the firm.

A. It might have done so, because of his long connection with it; because of his own personal interest; that would be purely problematical on my part. He had many connections with the copartnership that I did not have at all.

Q. You mean that prior to that time he had interests in the firm that might have been included in that valuation, and you did not know the actual value of it?

A. I meant because of his personal connections.

Q. At the time of this dissolution there were some large cases pending, were there not?

A. When Judge Lewis died?

Q. Yes.

A. There might have been quite a bit.

Q. I will call to your attention especially the big irrigation case, on which Judge Lewis was engaged, and which it was said really caused his death; I take it that the fees had not been collected in that case at that time. [632] A. No.

Q. You answered Miss Birdsall's question about your adjustment with the old firm in a manner I did not quite understand. Will you state that again, please?

A. Well, of course I would be construing a written contract, and I might be off, but my best recollection of it is this: When I entered the firm in the beginning, it was an old established firm, and there was a lot of business running through it that was

(Testimony of George W. Shute.)

overlapping; on that date they put me in on an equality with all that business. In other words, of the business then coming in, I got my share. When we made the partnership agreement, the arrangement was that in order to take care of that amount, which was considerable, when I would go out of the firm, either by dissolution or in any other way, that my income from the firm would cease at that time, which would take care of the overlapping business in the beginning. Do I make myself clear?

Q. You say that this is your interpretation of a written instrument; will you furnish that?

A. Yes.

Q. Under your construction of the written agreement, there was nothing due you from the old firm at the time this new agreement was entered into on May 2d, 1927.

A. That is my interpretation of it.

Q. You received nothing from the old firm?

A. It was my understanding that I receive nothing from the accounts that came in.

Q. In your answer to Miss Birdsall's question, you have shown a considerable income for the period you have been engaged in the practice of law in Phoenix; for instance, in 1927 your income was approximately $10,000. [633] Can you give an approximate estimate of the part of that that went to living and household expenses?

A. That would be pretty hard for me to do. I

(Testimony of George W. Shute.)

would a lot rather submit the deposit slips and checks; it would be much more reliable.

(Examination Continued by Miss BIRDSALL.)

Q. Have you any deposit boxes anywhere?

A. No.

Q. Have you ever rendered a statement for Martindale's Agency, for your rating? A. No.

Q. And you know what that rating is, do you not?

A. I don't know.

Q. It is from $5,000 to $10,000, is it not?

A. I never furnished any of that to them; I don't know where they got it.

I would like to mention my insurance policy. It is just an ordinary life policy and has no loan value whatever, so I did not list it.

The REFEREE.—It is in one of the old line companies?

A. Yes.

Q. Is it a term policy?

A. It is what is called ordinary life.

Q. Have you every borrowed any money on it?

A. It has no loan value at all. [634]

TESTIMONY OF GEORGE W. SHUTE, BANKRUPT, AT FIRST MEETING OF CREDITORS AS ADJOURNED FROM MAY 22d, 1928, ON TUESDAY, MAY 29th, 1928, AT 10:00 A. M.

(Examination by Miss BIRDSALL.)

Q. On the second page of the amended schedule you have filed, Judge Shute, you have listed a prom-

(Testimony of George W. Shute.)

issory note payable to the First National Bank of Arizona for $750, being secured by chattel mortgage on a Hudson car. The value of the security is not mentioned, but the debt is $750. What is the value of that security? A. Of the car you mean?

Q. Yes.

A. I think the list price of the car is $1765. I have been representing England for two or more years, I guess, and that is the second car I think I have purchased from them. He throws off a certain percentage, the amount of which I do not know.

Q. What amounts have you paid on this car. I think you said you purchased it in September or October, 1927.

A. October, I think it was. I haven't a record of it, but I think it was paid down to about $1200, including his throw-off.

Q. There is a conditional sales contract on this of record? A. Yes.

Q. What is the amount of that contract?

A. $1765.00.

Q. When is that payable?

A. There is no definite date. He always has told me to pay what I can, and when I please.

Q. You have made no payments except the work you have done for him? [635]

A. That is about the way it would figure out. I don't think I made any cash payments at all.

Q. I notice in these cancelled checks which seem to constitute your books of account that there was

(Testimony of George W. Shute.)

a payment on September 2d, 1927, of $250.00. Was that on that car?

A. That was on the car I gave Mrs. Shute a year ago last Christmas.

Q. Where is that car?

A. At the house. The purchase price of that car was about $900, or something like that; it was an Essex; there was no contract on it; it was paid for in full. I think I completed the payments on it this year. I bought it on credit but did not have any conditional sales contract; I bought it from England.

Q. I notice here there is another check dated November 25, 1927, for $250.00; what was that for?

A. Was that another check?

Q. Yes, the other one was dated September 2d.

A. Well, I think that was the way it was paid, in two $250 checks.

Q. This last one of $250—was that applied on the Essex? A. Yes.

Q. Was that a new car? A. Yes.

Q. What was the price of it? A. Around $900.

Q. Then I notice check No. 548 here, dated December 3, 1927, for $995.00; on what was that applied?

A. That calls for a little explanation. He has been throwing [636] off a little percentage on the list price of cars to me. The Wentworths in Globe wanted a new car, and in talking to them I told them about this percentage and they asked me if I could not get them the throw-off on the car they

(Testimony of George W. Shute.)

intended to purchase. I talked with England about it and he said he would do it for me. They bought a new Hudson car, and Mrs. Wentworth gave me $400 and later $900, completing the total purchase price of the car.

Q. Then this $995 you received from the Wentworths?

A. Yes. In other words, there is about $1300 cash payments that don't belong in my checks there at all. It was money they advanced to me to complete the transaction for the car.

Q. When was this car bought for Miss Wentworth? A. I think it was in December.

Q. When did they give you the payment of $400?

A. A little before the $900 payment was made by me. The checks will show the dates exactly.

Q. The check for $900 is dated December 3, 1927.

A. The one before that was the last payment.

Q. I do not find any $400 check to Mr. England—that is in the latter part of 1927. There was one on September 2d for $250 and *on* on November 25th and then this one of December 3d for $995.00.

A. Well, the two $250 checks paid for the little Essex. I am not sure the $400 was paid. I don't know whether I turned over the $400 check to them, or whether I deposited it and then paid it. I am sure of the $900 because that amount came in in cash; I deposited it in cash and checked it out.

Q. You deposited the $900 you received from them to your own account? A. Yes. [637]

Q. Does it show in your bank account?

(Testimony of George W. Shute.)

A. I imagine so. I think I deposited it with another amount of $500 on the same day.

Q. Do you think you could find those statements?

A. I think you have it right there, Judge Nealon.

Q. Here it is.

(Witness examines bank statement.)

A. Here it is (indicating).

Q. That is a different date. Did you issue the check afterwards?

A. No, it was the same date, or else the check was misdated. My recollection is that it was the same day.

Q. This was check No. 548. I have it dated December 3d; perhaps I left the "1" off, and it should have been the 31st. You deposited $1900 on that date? A. Yes.

Q. What was the other amount, the source of it, I mean?

A. That calls for another story. About two years ago, in, October, I was hunting at the head of Canyon Creek. Prior to that time I had drawn an option for a man named Goswick for some mining property. According to the option there was certain property that should go to Goswick if the option was not carried out. While I was out hunting he went out and found to his consternation that they were moving all his property off. He went back and telephoned over to me at the head of the canyon, and asked me to see what I could do. I sat down and wrote out a notice which he took down and served, and stopped them from moving off his property.

(Testimony of George W. Shute.)

Later on he made a deal on this property and he gave me that $500 out of what he received, for what I had done for him. [638]

Q. This $500 was a gift then, Mr. Shute?

A. Absolutely.

Q. It was not in the nature of a fee?

A. Not at all.

Q. This deposit is $1900. You received this $500 and $900 from the Wentworths; where does the other $400 come from?

A. Maybe that is where that $400 is, right there. The amount of the Wentworth check ought to have been right at $365; the purchase price of the car was right at $1400. I think I deposited the $500, and I think I paid the $400 on the car.

Q. Then this $1900 is no part of the receipts which you scheduled as coming from Armstrong, Lewis & Kramer? A. No.

Q. Then in making up your statement of receipts, you have other receipts besides what you received from the firm, then?

A. What do you mean by that?

Q. I mean you have given a statement of your receipts from the firm as being all the money you have taken in. In addition to that, then there should be other amounts that you have received, in order to make the books complete.

A. That depends on the way you look at it. You will remember I told you about the little block of stock we sold after we came down here. There was also a little Mrs. Shute owned in the Iron—Blossom,

(Testimony of George W. Shute.)

I think it was called; there was 100 shares of that. We sold that and I used the money. There may be two or three small instances like that; but except in very small items of that kind, the income was from the firm. [639]

Q. But the books you have submitted up to date are not an accurate statement of your receipts and disbursements.

A. Well, as nearly correct as I can make it, unless I go back and take up matters which are not material. The checks show as nearly as I can give it to you. If it isn't in the deposits, it is in the checks; if not there, then it is reflected in the statement prepared by Mrs. Parry.

Q. How would we have known what this $1900 was from the statements you have submitted. You have submitted a statement as showing your income during that period; how are we to know what other amounts you have received besides that income? How would we have known about this?

A. Well, you see I opened no bank account the first year I was down here. When I received my pay, I paid my bills if I could, out of it, and we ran strictly on a cash basis, and we had no bank deposits. At the beginning of the second year I opened a bank account. I have the letter right here showing the date. The date was January 16th, 1924. When I first began the bank account I had a small check-book, the kind you carry around with you, and that is the reason they don't run straight back to January 16th, the date I opened the ac-

(Testimony of George W. Shute.)

count; I was still using every penny in other things, during 1924, and made no permanent record; but after this date I don't believe there was a thing came in that isn't reflected in these bank statements or checks.

Q. It is reflected in the deposits in the bank, but how are we to know, except by taking up each one of them and asking what it is for, and what is the source of that money?

A. There is no other way. [640]

Q. You see in regard to your checks here, several hundred of them, even from the stubs you have here, are missing.

A. Yes, but the deposits are there, and the checks and stubs are there, or else an entry is made, showing the cash on that particular check.

Q. But it does not show what the money was spent for.

A. There would be no way of showing that. I would simply have to tell you where it came from and how it was expended. If I had anything that showed it I would be perfectly willing to turn it over, but I haven't.

Q. What I am trying to get at is, I am trying to figure out how the books can be checked so they will represent books of account, so you would know your exact income, the amounts disbursed, and what for.

Mr. LEWIS.—During the periods we have those statements, all the income is shown on Mrs. Parry's statement, and the bank statements show the de-

(Testimony of George W. Shute.)

posits. We could check the total of one against the total of the other.

Q. What I would like to know is what amounts you have received outside of that received from the firm, and what other such amounts were deposited that would go into the books.

A. They are all shown here.

Q. I am asking you for the amount.

A. I cannot tell you that,—I don't remember, but I do know they are all in this statement.

Q. Haven't you checked what you have received during that period with what has been disbursed?

A. I tried to; I tried to check them back against the deposits.

Q. What are those amounts; have you the statement here? A. What amounts? [641]

Q. The amounts you received.

A. They are all here.

Q. What is the total of them?

A. I don't know.

Q. You cannot tell what the total is?

A. I believe Mrs. Conger did run up a total, amount of those checks; that should be with the statement and checks.

Q. These checks only go back to November, 1925. You have had a bank account from January, 1924; where are those bank statements?

A. I don't know. During 1924 most of the checking was on a small pocket check-book, and when the statements were sent to me, they would probably

(Testimony of George W. Shute.)

come to my residence address, and we moved frequently; the chances are they are simply lost.

Q. You have made no effort to obtain duplicate statements?

A. No, I haven't asked the bank to do that; I thought if I furnished everything back of 1925, that should be enough.

Q. I believe there was an order to produce, here, by the Court.

Mr. LEWIS.—In answer to that order, we say that we have produced all we have.

A. I have even gone through the house; they are simply not available, and they must have been lost in the way I tell you; we must have moved almost once a year since coming here.

Q. Then your only return to that order is that you have stated you furnished all you could?

Mr. LEWIS.—Yes.

Q. I would like now to get a little straightened out on these cars. You stated in your testimony the other day [642] that you bought a car from your brother-in-law when you came here; what kind of a car was that?

A. It was called a Hudson Speedster.

Q. What was the price of it?

A. It was right at $1100.

Q. Who is your brother-in-law?

A. J. A. Pinyan.

Q. How did you pay for that car?

A. Through a financing concern; some of those checks give the name of the concern; I don't re-

(Testimony of George W. Shute.)

member it; it was written by Mishkin; there are some checks here to Mishkin, and they may be payments on that car; the payments were $90 a month; I don't know when I completed the payments; I paid $90 a month for what seemed like a thousand years. I turned in an old car as a down payment, but I don't believe I ever got anything for it at all; it just disappeared; it would have taken a little more than a year to have paid this out; it was a Hudson Speedster. I gave it to Virginia and Leslie, to buy a little car for them; it was about a year before I got rid of it, but in the meantime I got another car. One day I was down to England's, talking about cars; this car had run about 100,000 miles and was costing me a good deal of money. Mr. England took it and put it down in his basement, and showed me another car that he said he would guarantee in all its essential details; it was a Hudson coach that had been repossessed. It was a good car and I bought it on time from him at $800, approximately; I don't remember the exact date or the exact amount, but it was approximately that. That ran along until the new Hudsons came out; I kept that car until they came out. Then one day I drove this car into Mr. England's place, and he had a fellow there who [643] was going to the coast or up north somewhere who was looking for a good second-hand car. Mr. England said to him, "Look here, I will sell you this car, and sell it to you right." He got in and drove it around. The car really was a wonderful car, and they drove it

(Testimony of George W. Shute.)

around a block, and when they came back it was sold. England told me he would give me a new car, throw off the commission, and apply the purchase price of the old car on it, and I could pay the difference. That suited me, and I bought a new sedan. He applied the purchase price on it, of the old car,—and I think I paid him in cash the difference between that car and the car that had been turned in. I don't know the date of that, I think it was about a year ago now.

. . . . . .

Q. You say Mrs. Shute had this car since a year ago Christmas?

A. Not this identical *year* (car). The one I gave her a year ago last Christmas she traded in on this one, and I paid the difference. That was purchased about a year ago now, that is, the new coach was purchased about a year ago now; the one I gave her a year ago Christmas was the first one she had; I bought it in Globe, and paid for it in installments, and gave it to her on Christmas day; it may have been two years ago Christmas, but I think it was a year ago. It was an Essex, and I think the purchase price was $900; I paid Pinyan $54 a month on that; I paid it to a Finance Company, all except the last few months, I think I sent it direct to San Francisco, as Mishkin got into trouble. I had completed the payments on that car when I turned the car in, and she turned that car in to England on the car she has at the present time; she drives it and carries the license in her own name; the new one

(Testimony of George W. Shute.)

is all paid for; I think one of those $250 checks was the last payment on that car. [644] One of those checks was dated in September and one in November, yes; one of them, I think was the last payment on that car; it is my memory this is about a year ago; there are other cars I am interested in. I think I was talking about the old coach and the fellow who was going west. I then bought one of the new issue of Hudsons, a blue sedan; that was about a year ago now. That sedan I drove for two or three months, and then they came out with a new improvement on the motor of the Hudson. This was very soon after I got the car, and I raised cain with him for not selling me the new motor. After two or three weeks England told me to run the car into his place and he would give me a new one.

Q. When was this?

A. October or November of last year. I ran the car in there and he gave me the car in question.

Q. How much allowance did he make you on the other one.

A. I don't know. He just said he would give me a new car, and I think that is just what we did; exchanged the one I had for a new one,—because I had said so much about the new improved motor.

Q. Have you made any payments on the blue car?

A. Very few, if any.

Q. You had turned in another car to him, on the blue car, hadn't you?

A. Yes, I think there was $500 on that car; that should show on his books.

(Testimony of George W. Shute.)

Q. Then there should have been a $500 or $600 credit on the car you turned in?

A. I don't think so—it was just because of the difficulty we had, in exchanging these cars; I think that was the only credit allowed. [645]

Q. In the original sales contract Mr. England had here, the amount of the conditional sales contract appeared to be $1500.00; can you account for that?

A. I didn't say I paid that; I said there was a certain percentage off, but I don't know what that percentage was. In other words, the situation is such that if I said I would like to take this car out, he would say—all right. Maybe I would have a contract written for the difference, but whatever I would say would be all right with him. Then there was another car. When father died he had an old Hudson car; it wore out, so mother and May drove that car down a month ago, and I traded it in to England for a new Essex. I signed that paper for him; that is a brand new car; he allowed a credit on that of $400 and I am paying the balance.

The REFEREE.—That is an outside matter; we would not be interested in that.

A. Well, I am telling you all about it. I wouldn't want Miss Birdsall to think I am keeping anything back. I think that is the whole car transaction.

I have paid garage bills on Mrs. Shute's cars, but most of the garage bills have been my own. The bills show that since January 1, 1928, the garage bills have been $303, but I never permit a leak or rattle about my car. I use it practically every-

(Testimony of George W. Shute.)

where I go, and to save the situation as much as possible, I try to see that the car is well taken care of; I keep it down town, in the Tourist Garage on South 3d Street; the bills seem to show that the upkeep is practically $75 a month; I know it costs like the dickens. I haven't paid any garage bills on Mrs. Shute's car; the last couple of [646] weeks I haven't patronized any except the Tourist Garage and Griffiths; the checks to Paul Bennett are for gas; the ones to Griffiths are for repairs; the ones to the Tourist are for storage, and maybe for a little gas; they haven't done any work on that car for a long time, however, most of it is for storage. I pay $5.00 a month for the car as I keep the car there permanently; then I drive Mrs. Shute's down on days she isn't using it and leave it there in the day time and pay $5.00 a month for that; his usual charge is $7.50 a month.

Q. On the 9th of April you gave a chattel mortgage on this car to the First National Bank of Arizona to secure the payment of $750.00. Did you think when you gave that mortgage that you had any equity in the car?

A. I think I have an equity in it now. Under the conditional sales contracts you have no equity; you either own the contract or you don't. I hope when this matter is over that I can go back and continue to pay out this car, but I am not going to pay it out for someone else's benefit.

Q. If that is true you have some idea of what equity you have.

(Testimony of George W. Shute.)

A. I think I have reduced it to $1100 or $1200.

Q. You think there was an equity in the car of $500 or $600 at the time of bankruptcy.

A. There is no equity under the conditional sales contract.

Q. I realize that, but at the same time there are credits on it.

A. Yes, I have credits of $500 or $600.

Q. And this is what you mortgaged to the bank? [647]

A. No, I mortgaged the whole thing to the bank. They demurred about taking it; they said they didn't want a chattel mortgage, but I said that it looked like I was going to have a little difficulty and that if there was anything in it, it would go their way rather than some other way.

Q. You borrowed $750 from the bank then?

A. I have told you a dozen times that I did.

Q. How was it paid to you? A. In cash.

Q. Did you deposit it to your account?

A. I don't believe I did; I think I paid it out in cash.

Q. To whom? A. To different creditors.

Q. What creditors?

A. Well, I paid some garage bills and—

Q. They were paid by check, weren't they?

A. Just speaking from memory, I paid $200 to Mrs. Geare in Los Angeles; I had been owing it for some five or six years; I paid that to her in cash.

Q. For what did you owe that?

A. I had borrowed it from her in Globe.

(Testimony of George W. Shute.)

Q. When was that? A. In 1921.

Q. Did she have a promissory note for it?

A. No.

Q. That indebtedness was incurred subsequent to Mr. Mackay's wasn't it?

A. That was in 1919—yes, I think so.

Q. You paid her the $200?

A. In cash, yes. [648]

Q. What else did you pay with this $750?

A. I can't remember all of them, but I paid it all out. I paid the bank $100 out of that also; I had a note there, for thirty or sixty days; sometimes I borrow a hundred and give a note for it. I don't remember any other payments I made out of it; I am not sure whether I paid Mr. Lewis $100 out of that or out of a dividend; I don't believe I deposited any part of the $750; I think I used it as cash.

Q. Then if there were any deposits made in the bank immediately before you filed your petition in bankruptcy, they came from some other source, did they? I notice here that on April 9th, which was the same day you made this chattel mortgage, there was a deposit of $200; what was that?

A. On the same day?

Q. It was on April 9th.

A. Well, I may have done that.

Q. On April 11th there is a deposit of $250.

A. That came from the dividend that came in subsequent to the filing of the petition.

(Testimony of George W. Shute.)

Q. You didn't file your bankruptcy petition until the 17th, did you?

A. That must have been the dividend; it could not have been from any other source.

Q. Have you brought the statement that Mr. Nealon reruested at the last meeting, showing the statement made to you by Armstrong, Lewis & Kramer,—of the different amounts paid you?

A. I think there was one of them.

(Handing witness paper.)

Q. I will ask you to look at that. Is that a statement of [649] the income received from Armstrong, Lewis & Kramer during the period it purports to cover?

A. Mrs. Parry usually signs these, or puts a little tab on them, but I think that is her recapitulation of the amounts I have received since 1925, from the firm.

Q. You have not made up any statements of amounts received prior to that time, and submitted them to the trustee, have you?

A. No, but she asked me if she should go clear back.

Mr. LEWIS.—The request was that we should follow the checks.

Q. Do you think this is the original statement?

A. Yes, I think so.

Miss BIRDSALL.—I would like to have that marked for identification as Bankrupt's Exhibit 1.

A. That is not what that is. Mrs. Conger made that up. She totaled the amounts of checks and

(Testimony of George W. Shute.)

receipts. The amount is somewhere here, showing what I received from the firm.

The TRUSTEE.—Is this it? (Exhibiting pink slip of paper.)

A. Yes, that is it. If those two are pinned together they will make a complete statement of what I have received from the firm since November, 1925.

Q. I will ask that they be pinned together and marked for identification, as requested, as being the original book entry filed by the bankrupt.

Mr. LEWIS.—That covers a bit more than up to the date of the bankruptcy; it is to May 1st. In this typewrittten statement [650] which is marked "Bank reconcilement," the receipts marked to May 1st total $26,671.78, while the pink statement seems to indicate that there were some other payments, making a total of $30,071.78; I imagine those figures that Mrs. Parry has to May 1st mean the whole of the year 1928 up to the date she made the slip that is my conclusion,—$26,671.78; that should bring it down to—well that couldn't be, either, because that is 1928; she totaled the checks to April 21st.

Q. Did you have any receipts in addition to those from the firm?

A. They are all here. Her figures are supposed to be right up to the minute.

Q. Did you give her any other amounts besides those received from the firm?

A. No, Mrs. Parry keeps all of those accounts herself.

(Testimony of George W. Shute.)

Q. You have no amounts that you received from other sources than from the firm? A. No.

Q. You have testified to $500 as received from Goswick; might that be that?

A. That was last year, you see.

Q. Well, what does this $30,071.78 mean, then?

A. I don't know.

Q. How are we going to find out?

A. Ask Mrs. Parry; she will know; in fact, this doesn't look like her writing from here down (indicating); looks like someone else had put something on there.

Q. Well, we will leave that for the present. Can you tell of your own knowledge approximately what you have received from the firm; would that amount of $2450 be the amount you had received to the date of bankruptcy? [651]

A. I think that would be too much; I have had no dividend in May; we had one dividend the 1st of April, and I think that would be too high.

Q. Have you any idea of what these figures represent?

A. If they don't represent what you received from the firm, how are we going to find out?

Mr. LEWIS.—That statement there should show it.

Miss BIRDSALL.—This is the first time we have seen that at all. Now, in going over roughly the checks submitted from November, 1925, to the present time, I find about $3700 as drawn to cash or

(Testimony of George W. Shute.)

with no record of what they represent; can you testify as to what became of that?

A. Since 1925?

Q. Yes.

A. Yes, I have an idea of what became of it; that is the way I would draw out money; I might draw a check to cash, get the money, and then it would go in a hundred different ways.

Q. What were those ways?

A. Well, part of it might be for money I would use on trips, in part.

Q. But when you did that you would receive it back from the firm? A. Yes.

Q. That would show as being in addition to the regular dividends, then? A. Yes.

Q. Was any part of that spent for investments of any kind? [652]

A. No. Wait a minute, there was—no, none of the cash was spent that way.

Q. Have you made any investments during that time?

A. I invested $250 with Arthur La Prade in some oil land in Texas or Alabama.

Q. Have you stock for that?

A. I have nothing. Arthur La Prade came over some time ago and told me, with Mr. Moore and two or three others, that he had an old school-teacher who had some leases in Texas that promised to make a quick return and asked me if I would go in with him, and raise some money to do something with the leases. I told him I would go in for $250

(Testimony of George W. Shute.)

if he assured me that it was all right. He told me this man knew what he was about, and that by the first of the year, or within a few months, we might expect to get back three or four times what we put in. The fellow was just a fake. After a certain length of time we found out that he had no leases at all, nothing at all, in fact, except a glib line of talk, with which he had imposed on La Prade. After I filed the bankruptcy petition, and after this came on, La Prade sent me a check for $250. I asked him why he had sent it back, as it was not incumbent on him to do so, but he said I was in financial difficulties, so he sent it to me.

Q. Then that $250 really belongs to the bankruptcy estate?

A. Maybe it does; I am not sure. It depends on how you look at it. La Prade was not under obligations to return that to me; the man imposed on him.

Q. I have here a number of checks numbering about $285 to Berryhill; what are they for?

A. They represent payments on a phonograph which I bought for Mrs. Shute just before Christmas. [653]

Q. Have you any other musical instruments in the home?

A. No; that was being paid for in $50 a month payments.

Q. What was the price of it? A. $385.00.

Q. Is it all paid for?

A. There may be two months back on it.

(Testimony of George W. Shute.)

Q. On January 4, 1928, you drew a counter check for $500. Do you recall what that was used for?

A. When was that?

Q. January 4, 1928.

A. I don't recall drawing that amount of money.

Q. That was only three months ago, and that was a considerable sum of money.

A. I don't remember it, but it will probably come to me. My mind isn't working as it ought.

Q. There are some of the cash items aggregating $3700 that show as having been drawn to cash since November, 1925. On November 29, 1927, there was a counter check for $300; do you recall what that was for?

A. I imagine I drew that out and gave it to Mrs. Shute for money to use in the house.

Q. On November 17, 1927, you drew $100 and on November 17, 1927, one for $150.

A. I probably drew that out for expenses in making a trip, or for house expenses.

Q. Would you have given her $550 during a period of two weeks?

A. I might have. She would probably remember it much better than I.

Q. On October 28, 1927, there was a counter check for $100, to cash; what was that for?

A. That might have been for the same purpose; checks of that size are very usual. [654]

Q. What amount, per month, approximately, did you give her for household expenses?

(Testimony of George W. Shute.)

A. What I would receive would control that very largely.

Q. But you know approximately what the household expenses were, don't you?

A. Well, we pay $75 a month rent and—

Q. You pay that by check, don't you? I mean outside of that.

A. Well, the groceries, her clothing, etc., would amount to probably $250 a month.

Q. That is in addition to the rent, lights, water, and telephone, which you pay by check?

A. I think so. It just depends on how much you have; if you have the money, it goes. Mrs. Shute is not at all extravagant, and we often talk about it and wonder where it goes. She does not have a maid; she does all her own housework.

Q. Yes, it is because I know those things that I am asking you, and I do not understand it. You will recall in September, October and November that you were negotiating with me about the settlement of this Mackay claim.

A. Yes, I recall it.

Q. And you said you did not think you could bind yourself to pay as much as a hundred dollars a month. A. Yes.

Q. And yet you drew $300 and $500 checks with considerable liberality, it seems.

A. It was my money.

Q. It was your creditors' money.

A. No, sir, not this creditor.

Q. It is scheduled as a debt.

(Testimony of George W. Shute.)

A. Yes, I scheduled it. [655]

Q. On February 20, 1928, I notice a check to White and Wesley for $100; do you recall that?

A. That was for a setting for a ring.

Q. For whom? A. For Mrs. Shute.

Q. What property has Mrs. Shute in her own name, in addition to the property you have testified to, at Globe?

A. She has a little savings account of about $1,000.

Q. Where is that?

A. In the First National Bank. Then she owns her personal belongings, the house in Globe and a few things I have given her.

Q. Has she any other investments?

A. None at all.

Q. Do you pay the expenses on the property at Globe?

A. No, most of that comes out of the rent of the house. I don't think there was any rent to pay for putting up something for the sewer. I believe I paid that. I think I am a year behind on the taxes now. Last year's taxes are due on the property now; she was asking about it a couple of weeks ago. I pay $2.00 a month on the water; the renter pays the balance. The check in September, 1927, for $70.64 was for past due taxes; we have been trying to make up the back taxes. The place is rented for $50 a month now; it is made out in a check to me and I turn it over to her. There may have been an instance or two where I deposited it

(Testimony of George W. Shute.)

to my own account, but I have always tried to turn it in to her, as I didn't feel I had any right to it. Most of it has been applied on the place in some way; we have tried to use the rent to keep up the expense on the house. If there was an occasion where I could pay something for her, I did so, [656] and let the $50 stay in her savings account. I did not say that I would ascertain the amount still due on the mortgage to Mary E. Holmes, but I think the amount is about $700. I wrote Mrs. Holmes about it five or six weeks ago and in her answer she referred me to Mr. Foster; the amount of the mortgage was $3500, and it is all paid except about $700; the check dated September 7, 1926 for $3,000 was applied on the mortgage, and the $300 in monthly payments. I believe the mortgage was given in 1919, when I purchased the place.

Q. You said Mrs. Shute purchased the property with money she received from property she sold in Prescott. How much did she obtain for that?

A. Something like $4500.

Q. How much of that was paid on this place?

A. I will have to tell you a little about that so you will understand. Mrs. Shute owned this property in Prescott, and in about 1913 or 1914 she sold it. I think she received a little over $4500 for it. When that money came down, we used it in living expenses just such as you see in these checks. We bought a little house on Devereaux Street and part of this money was left, and the understanding was that Mrs. Shute should keep the real estate to com-

(Testimony of George W. Shute.)

pensate her for the money she had received from the Prescott property. Then later we traded that in, through the Bank, for the place on Sycamore and First. That is the house she has now; we bought it from a man named Sanders.

Q. What was the purchase price?

A. $6500. It was put in her name to protect her in the amount of $4500.00.

Q. You have testified that you have paid in $1,000 in payments on this place. [657]

A. I think it was more than that. I think when I get it all paid, with a low rate of interest, Mrs. Shute will be about paid her interest.

Q. And what you borrowed from Mary E. Holmes was on the purchase price of that property?

A. It went into the purchase price. We paid Sanders in full for it.

Q. From whom can we get the record as to the balance due on it?

A. No one, except from her. It drew 8% interest.

Q. Is the note here?

A. I imagine she has it.

Q. The payments were made direct to her?

A. Yes, she is a very dear friend of mine. I think there is approximately $750 due on it; the taxes run $85 or $90 a year. The check to Bandaur for $500, where the stub says "stock,"—Bandaur told me about an investment he and Snell had in Kingman; said he had a friend who was handling the transaction; and that if I would put in $500, he

(Testimony of George W. Shute.)

would guarantee we would not lose our money; we were to pay 25¢ and sell it for 50¢; I never got the stock, receipt, or anything else; it is gone, Bandaur is responsible if he wants to be; I have talked to him and he says the fellow just double crossed us, and I believe that is just what happened; I trust Joe implicitly. The check dated June 24, 1927 for $500 I imagine I gave to Mrs. Shute for a trip last summer; she left about that time, I cannot say definitely, but I gave her about that amount when she left. H. E. Smith is Mrs. Shute's brother's son. He graduated from a school of dentistry and she wanted me to send him $50 to buy something he wanted for his office when he started out, and that check of June 23, [658] 1927, was for that. The check of November 10, 1927, to Armstrong, Lewis & Kramer for $139.29 was for one of two items. It probably represents the 15% interest that I had in Judge Lewis' estate; the other check for $179.49 that was an accumulation of amounts that had run five or six months. Suppose I should go to Tucson, and I drew $50 for expense of that trip and I spent $25 of it. I am charged with the whole amount; they run along and then are checked up. That item is one of the two things. On June 9, 1927, there is a check made to cash, $100, endorsed on the back "Eileen Whitlow"; she was a little girl who stayed with us and taught school at the Osborn School. She was taken sick and I deposited this to her account, for a few dollars to use when she went home; I gave it to her. The check on February 23d

(Testimony of George W. Shute.)

to V. H. McAhren was for more experience. McAhren and I went on a fellow's check for $300 to make a trip to Kansas City; that is my half of that. The check dated January 21, 1927, to J. B. Armour for $200, and one April 14, 1927, for $100, represents money I let Bud have; he has returned most of it, in different amounts from time to time. I would never ask him for it; I take it out of money I received as income and loaned it to him; it was originally received from Armstrong, Lewis & Kramer; that was its source; it merely came back. If I took a list of checks in which this $300 was included and checked it against my income it would be really checking $300 more than my income, yes, but it would still be the same amount of income; it isn't income; it is a receipt; I won't argue with you as to whether it would be checking my disbursements against my receipts. [659]

Mr. LEWIS.—He could make his bank account practically double what it is by drawing a check and then redepositing the money; it is slightly deceptive in that way, where he would borrow a hundred dollars and then get it back.

Q. I don't think he understands yet what I am getting at.

Mr. LEWIS.—Well, you can't make the income from the firm any more or any less; it is what it is; but other amounts he received from any source should be added to that, of course. But whatever amounts he loaned and had returned should be deducted.

(Testimony of George W. Shute.)

Q. This amount and the others are all shown, but they do not all come, as it now appears, from money he received from the firm.

Mr. LEWIS.—You mean all the deposits that show on the bank statements; no, there is a difference of about $3,000 there.

The TRUSTEE.—In your schedules filed on the 16th or 17th, your statements show receipts from Armstrong, Lewis & Kramer of items of $2,000 and $450. I would like to have the dates you received these distributions. I am asking you now so that you can look them up; I also notice that your check stubs do not carry up to the time of filing your petition; have you the rest of those stubs?

A. They are probably in the check-book I am now using. I think the Iron Cap stock I sold brought $300 a share; it may have been $325; there were 100 shares, I didn't recollect it but Mrs. Shute told me; it was sold during 1923; that is all we ever owned of it; it was never hypothecated to the bank; the stock the Valley Bank had was in my name because I received dividends from it; I could not have received them otherwise. [660] That was 1000 shares, and it is my recollection that the only other block of stock I ever owned in the Iron Cap was this 100 shares. Then there was that Utah stock I mentioned this morning; I think that was a reorganization, and the reorganization of the concern paid off the old stockholders on the basis of 30¢ on the dollar, or something like that. They retired

(Testimony of George W. Shute.)

it completely; I can't think of the name of it, but it seems to me it was the Iron Blossom.

(Examination by TRUSTEE.)

I did not testify that in June, 1924, I paid something like $2200 to the Old Dominion Bank in Globe; it was in 1927; it was represented by notes that the bank held; the total amount of that indebtedness was right at $3,000; there was nothing owing to the Copper Cities Bank in addition to that; that was all I owed over there; it had run along for years; the beginning of it was years before that. It was for small notes, making up overdrafts, and little amounts I had borrowed from time to time. It started as early as 1911 or 1912. The notes had been renewed and the interest compounded, etc. $3,000 was the principal with accrued interest. I think that was all I owed; I didn't figure it very closely. They said they would take $2200 and I paid that. I don't recall when the payment was made to the firm of Armstrong, Lewis & Kramer in the big irrigation case; it seems to me it was close to June 1st, 1927, but my recollection is hazy.

Mr. LEWIS.—It was in that part of the summer, not later than July; I think it was the very latter part of May or the first part of June. [661]

Q. Just before lunch I asked you if you would obtain the dates of the payments made you by the firm.

(Witness thereupon handed check stubs and pink slip to the Trustee.)

Q. This statement shows a receipt by you from

(Testimony of George W. Shute.)

the firm of Armstrong, Lewis & Kramer of $750.00 on Februay 16th of this year. Is that correct?

A. Yes.

Q. You are satisfied as to its correctness?

A. Yes.

Q. On March 14th there is a payment of $625.00?

A. Yes.

Q. And on April 10th, $765. A. Yes.

Q. This is in addition to the amount on January 26th of *$3,00* and *and* on April 10th of $150, is it not?

A. Those last two might have been included in the others.

Q. One of them is the old firm and the other is the new firm, as distinguishing the two firms of attorneys? A. Yes.

Q. That shows a receipt by you in the month of April prior to the filing of your petition in bankruptcy of $875 in the two items? A. Yes.

Q. In addition to that, during that period, you received $750 from the bank, as to which you testified? A. Yes.

Q. Now have you received, subsequent to the time of filing your petition in bankruptcy, from the firm of Armstrong, Lewis & Kramer any dividends?

A. That shows them all.

Q. The last date on here is April 10th?

A. Then that is the last. [662]

Q. You have received none since then?

A. That shows all of them.

(Testimony of George W. Shute.)

Q. During this year, 1928, did you receive any income from any source other than the firm of Armstrong, Lewis & Kramer? A. No.

Q. Other than this $750.

A. Yes, I know that.

Q. Have you owned any other real estate, during the past ten years, other than that one lot listed on the schedule and whatever interest you might have in Mrs. Shute's property. A. No.

Q. Have you owned any personal property other than that shown in the schedules and that disclosed by the testimony here, during that period of time?

A. During the last ten years?

Q. Yes, during the last ten years.

A. That is rather a hard question to answer; there is nothing that stands out in my memory. I owned a few cattle and sold them to my brother in 1914 or 1915.

Q. In the last ten-year period have you ever had as much as $10,000 in personal property at any one time? A. I should say not.

Q. Did you save any money out of your salary,—as Judge, I mean? A. No.

Q. I believe you testified this morning that you had to get some funds from Mrs. Shute during that period, when you were on the bench? A. Yes.

Q. And that was used in living expenses?

A. Yes. [663]

Q. At the time of the purchase of the property in Globe now standing in Mrs. Shute's name, did she have a bank account? A. No.

(Testimony of George W. Shute.)

Q. The money that was paid in cash on that deal, where did it come from?

A. You mean on the original purchase of the house in Globe?

Q. I mean actual cash.

A. I am a little bit hazy as to where it came from. Part of the Prescott money went into the little house and the rest of it we worked out during a period of years until it was finally paid.

Q. That was the house on Devereaux Street?

A. Yes.

Q. Is that all paid for? A. Yes.

Q. Do you know how much of Mrs. Shute's money went into that house?

A. I know we intended to protect her for $4500, with the title to this property.

Q. The Devereaux Street property was $2100.

A. Yes.

Q. Was it paid all in cash? A. No.

Q. Do you recall how much of it was?

A. It must have been a small amount. It seems to me that Mrs. Shute was in Prescott when we bought it; that is why I say this money was put into it. The owner only required a small initial payment, and that probably came out of the Prescott money.

Q. About when was that transaction?

A. It was in 1911 or about that. [664]

Q. What year did you go on the bench in Globe?

A. 1912.

(Testimony of George W. Shute.)

Q. I asked you here the other day to produce your life insurance policy.

A. That is at the office; I will send for it.

Q. What methods did you use to keep your accounts, prior to the opening of the bank account?

A. I didn't keep any. I received my salary on the 15th and the 1st, and paid it out in bills, and was usually about $9.60 short.

Q. I asked you if you had any statement of balance sheets rendered you previously by Armstrong, Lewis & Kramer.

A. Mrs. Parry gets them out quarterly.

Q. Have you any of those statements?

A. I will ask Orme to get them for you.

Q. There is a reorganization of the firm in progress at the present time isn't there?

A. Yes.

Q. Has there been any inventory or appraisal or balance sheet made up for that purpose?

A. Not yet.

Q. That is contemplated?

A. That is my understanding, yes.

Q. Can you give us at this time an estimate of the value of your interest in the firm of Armstrong, Lewis & Kramer?

A. I don't know what it would be; I haven't the slightest idea.

Q. Will you furnish me with such data as you can that I may submit it to the appraisers of this estate?

(Testimony of George W. Shute.)

A. I will give you whatever assistance I can. [665]

Q. Have any steps been taken to abrogate the contract of which you gave me a copy?

A. You mean the partnership contract?

Q. Yes. A. No.

Q. I notice in some of the checks that approximately $100 income tax has been paid by Mrs. Shute, or rather you have paid amounts to that extent for her income tax; will you explain that?

A. Mrs. Parry divided that between the two of us so as to make it a little cheaper; she made it up in two separate sheets for reasons of her own.

Q. You have in your possession, I take it, copies of the income tax return? A. Yes.

Q. Will you give these to Mr. Lewis so I may examine them? A. Yes.

Q. This exhibit marked as Creditor's Exhibit No. 1, says, "Moneys received up to May 1st, 1928"; as a matter of fact, the $26,671.78 was all received prior to the time of the filing of the petition in bankruptcy was it not?

A. Yes, I imagine so.

Q. Now, there is added to the $26,671.78 other items on this pink sheet attached to and being a part of Exhibit 1, raising the amount to $30,071.78. Does that all represent money you have received from Armstrong, Lewis & Kramer?

A. The memorandum shows that.

Q. During all this period, did you receive any

(Testimony of George W. Shute.)

large sums of money from any other source, other than those you have testified to? [666]

A. I think I have testified to all of them, either at this hearing or the other one.

Q. There is a memorandum on the back of this sheet, which is a part of Exhibit No. 1; it is in pencil. Will you kindly examine it and see if it has any bearing on the matter before us?

(Witness examines paper.)

A. I have no idea what it is.

Q. Are those your figures?

A. They are not my figures.

Q. You have already made all the explanation you can about the check stubs that are missing?

A. Yes, I have tried to recall that $500 check, but I cannot remember what it was expended for.

Q. Has Mrs. Shute any independent property on which she is drawing income? A. No.

Q. Now, in regard to conducting the business of Armstrong, Lewis & Kramer. The business goes into the firm and you divide the work among yourselves, and do it as it is most convenient; is that it?

A. No, ordinarily we all have our personal clients, who come either to Mr. Armstrong, Mr. Kramer or to me. The work is not allotted around until some one of that group has a line of work he cannot take care of; then there is a discussion and it will fall to the one who has the least on hand.

Q. And your take care of it in the way that is best to suit your own convenience. A. Yes.

Q. Now, during the four months immediately

(Testimony of George W. Shute.)

preceding the bankruptcy, can you tell me what debts you have [667] paid?

A. I cannot answer that without going through those checks and stating what they were used for. There are a few items outside of those checks that I have paid for.

Q. In my report I listed all your property with the exception of your library. I did not count that in. Have you any other property that does not come within the exemption statute, piano, for instance, or musical instruments?

A. We have none of those things.

Q. The checks to the treasurer of Gila County were for taxes on the house at Globe?

A. Yes, I think we paid one or two years.

Q. They are not on any other property?

A. No.

Q. This mortgage to Mrs. Holmes; was that purchase-money mortgage? A. Yes.

(Witness produces life insurance policy and presents it to trustee.)

Q. This is the only life insurance you have?

A. Yes.

Q. Is there a loan against it? A. No.

Q. I will ask you to leave this with me, so I can ascertain the conditions of the policy. A. Yes.

The REFEREE.—Do you intend to keep this in force?

A. I think it is behind a little.

The TRUSTEE.—I would like to find out the cash loan value.

(Testimony of George W. Shute.)

A. It has no loan value; it won't lapse until the 20th of June. [668]

The REFEREE.—According to the policy there is a cash loan value of $750.60 the surrender value exceeds the loan value a little.

A. As I understood it from the agent, it has no loan value.

The TRUSTEE.—I may want to ask the Court to appoint appraisers, and I will have to give this a little further consideration.

(Examination by Miss BIRDSALL.)

Q. This statement you have submitted this afternoon shows the receipts from Armstrong, Lewis & Kramer since the first of the year? There is one February 16, $750; March 14th, $625, and one April 10, $625; then on January 26, $300 and on April 10, $150.

A. The lower figures are old accounts which we have in the Trustee account; we have two accounts, the old firm and the new firm; we have to pay the Lewis estate the amount due it. In the new account we only have the accounts in which the Judge Lewis estate has no interest.

Q. The $2450 was received by you since the first of the year? A. Yes.

Q. Was that all deposited in the bank?

A. The deposit slips are shown there.

Q. The deposits aggregate $2075; that is why I am asking; you have heretofore testified that you put it all in the bank.

(Testimony of George W. Shute.)

A. Well, that is my practice. I either take it down or send it down and deposit the original check.

Q. You can look at that statement there. The first payment, January 26th, $300; you seem to have some small amounts deposited in January, but not $300. [669]

A. January 26th shows a deposit of $150 and February 8th shows another $100.

Q. According to this statement you received $750 on February 16th; does the deposit show this?

A. The $550 item is here; I probably drew out the difference and gave it to Mrs. Shute. I do that often and the deposit slip will only show the amount actually deposited.

Q. Then if that has been done frequently, it does not reflect everything, does it?

A. It shows the amounts received. The deposits, it is true, will not show whether they are from the firm or not.

Q. But you say you did not deposit all of the amounts received from the firm?

A. No, but the amounts I received from the firm show on the statement, so you see you can check them.

Q. We could determine what you received from the firm, but you received other items that did not come from the firm, and on the other hand some of the items you received from the firm did not go into the bank, so it is not a complete statement of books of account. If we had a statement of what you received from the firm and then a statement

(Testimony of George W. Shute.)

of other amounts you put into the bank we might know what your complete receipts were, but we don't know now.

A. Well, what I have said about the checks which I received in the form of dividends is true of everything else. Take this item on February 29th, for example. The chances are I sent that down and told her to deposit it and bring me back $200. She would deposit the $550 and bring me back the $200, and there could be no check on that because it went into the housekeeping. [670] But you have a statement showing the amount was received, and with the exception of small amounts used in that way, the deposits show the amounts received from the firm.

Q. The bank deposits would indicate that even since the first of the year there was $450 received from the firm that wasn't put in the bank at all.

A. Yes, probably more than that.

Q. When was this $500 payment received from Mr. Goswick? A. In December, 1927.

Q. Have you ever received any other amounts from him?

A. Only for fees. They would go into the firm.

Q. This $500 was not fees? A. No.

Q. Have you any interest in these options of Goswick's? A. No.

Q. You do not expect to receive any other amounts from him than this $500? A. No.

Q. If he should send you any more money you would be surprised, would you?

(Testimony of George W. Shute.)

A. I most certainly would. [671]

The following is a copy of document attached to transcript of hearing of May 29, 1928, before referee in bankruptcy:

1923.	$400 per month except Dec. when	$ 600.00	$ 5,000.00
1924.	January 15	$ 450.00	
	February 1	375.00	
	March 7	437.50	
	April 2	250.00	
	April 16	375.00	
	April 23	250.00	
	May 10	375.00	
	May 21	750.00	
	June 17	225.00	
	July 9	225.00	
	July 24	150.00	
	August 18	525.00	
	September 16	300.00	
	October 3	187.50	
	October 21	300.00	
	November 5	225.00	
	November 10	150.00	
	December 12	287.50	
	December 23	150.00	
	December 31	352.45	6,339.95
1925.	January 12	450.00	
	February 2	300.00	

1925.	February 11	750.00	
	March 5	300.00	
	March 19	225.00	
	April 13	375.00	
	[672]		
	April 20	225.00	
	April 24	450.00	
	May 11	270.00	
	May 25	450.00	
	June 30	600.00	
	July 13	150.00	
	July 30	150.00	
	September 9	450.00	
	October 8	300.00	
	October 26	150.00	
	November 4	375.00	
	December 12	450.00	
	December 31	319.14	6,793.14
1926.	January 16	180.00	
	February 6	750.00	
	February 24	225.00	
	March 9	225.00	
	March 26	900.00	
	April 23	450.00	
	April 27	300.00	
	May 24	300.00	
	May 29	300.00	
	June 17	450.00	
	July 13	375.00	
	August 16	225.00	

1926.	August 27	300.00	
	September 21	675.00	
	October 11	750.00	
	November 15	300.00	
	November 22	300.00	
	December 14	225.00	
	[673]		
	December 23	375.00	
	December 31	222.45	7,827.45
1927.	January 3	825.00	
	January 21	750.00	
	February 16	450.00	
	March 8	450.00	
	April 11	675.00	
	April 27	450.00	
	June 6	6,000.00	
	June 9	300.00	
	July 6	875.00	
	July 21	675.00	
	October 3	500.00	
	October 25	500.00	
	November 8	375.00	
	November 15	400.00	
	November 25	825.00	
	December 19	750.00	
	December 31	450.20	15,250.20
1928.	January 26	300.00	
	February 16	750.00	

(Testimony of George W. Shute.)

1928.	March 14	625.00	2,667.25
	April 10	775.00	217.25
	June 2	~~217.25~~	2,450.—
			2,667.25
			$43,823.99
			217.25
			43,606.74

[674]

(Back)

Received and Admitted in Evidence upon Stipulation of the Parties on Hearing on Objections to Discharge.

Filed Jan. 4, 1929. C. R. McFall, Clerk United States District Court for the District of Arizona. By J. Lee Baker, Chief Deputy Clerk. [675]

GEORGE W. SHUTE testified as follows before referee in bankruptcy, June 15, 1928.

(Examination by the TRUSTEE.)

Q. Judge Shute, here is the insurance policy, in which I notice the right to change the beneficiary has been reserved. I wanted to examine it.

(Policy handed to Mr. Shute.)

Q. Do you want that with you?

A. Yes, I would like to have it.

Q. But you will return it for the record?

A. Yes.

(Testimony of George W. Shute.)

Q. Judge Shute, on the copy of your income tax return for 1927, I notice that you have a deduction for bad debts of $1360. Twelve hundred dollars of that was a note of Joseph E. Noble, in regard to which Mr. Ganz has testified. A. Yes.

Q. Have you that note in your possession?

A. I don't know whether I have it or Mrs. Shute has it.

Q. I will ask for an order directing that the note be given in to the court.

A. I will resist that until I can tell you about this note.

Q. You can make an explanation of it, if you wish.

A. This is the way that happened. Joe Noble went to school with Mrs. Shute. I didn't know him during his school days but she did, and she was very fond of Joe Noble. After that I got pretty well acquainted with him, and he had the run of the house. During 1917 and 1918 he was in command of a little troop of infantry stationed at Roosevelt Dam, and he used to come to our house constantly, and we both grew very fond of him. After he came down here, it continued and we both considered him a hundred per cent O. K. One morning he came into the office and [676] told me a story of some trouble he had gotten into and said he had to have a certain amount of money that day. I told him Mrs. Shute had a little savings account, and that if he would be sure to pay it back and take care of her for it, he could probably get

(Testimony of George W. Shute.)

the money from her. I went with him to one of the loan concerns for the amount of money which he wanted, but they wouldn't loan him but $300. He asked where Mrs. Shute was and I told him she was shopping somewhere; that she had come down with me that morning and he said he would go out and find her. About half an hour later he came back with her. I explained to her what the trouble was and she finally said she would let Joe have it if I thought he would pay it back. I talked to Mr. Washburn about it, as he was acquainted with him, and he thought the same as I did about it. I made the arrangement myself with the bank, it was for an even $1200. Mr. Washburn made the arrangements with Joe, in which he said he would pay the note, and I endorsed the note for him. It ran along and Joe did not meet his obligations, and finally when it fell due the Bank asked me to pay it, and I drew the amount out of her savings account and paid it. They turned the note over to me, and we have it. That has been the subject of many a bitter controversy between Mrs. Shute and myself. Joe has never paid a cent of it, and I have charged it to experience and let it go at that.

Q. I am asking for an order for the note on the theory that it is an asset of the estate, for whatever it may be worth.

A. The note belongs to Mrs. Shute. It was paid out of her savings; I never had a dollar to pay it with; that was understood by all of us. [677]

(Testimony of George W. Shute.)

Q. I must ask for an order for the note. It has been shown by the testimony of yourself and Mr. Ganz that the savings account was made up, to a large extent, of earnings of Judge Shute as a member of the firm of Armstrong, Lewis & Kramer; that it is community property, and therefore this note is an asset of the estate.

A. We will resist that.

Q. In this copy of your income tax report for the year 1927, I call your attention to the fact that this $1200 is included in your income tax return, and not in the income tax return of Mrs. Shute, being listed therein as a debt; is that correct?

A. That is correct, but that income tax return was made up by the bookkeeper by making it in two returns, and so made up as to make the cost as low as possible; naturally I did not explain these matters in detail to Mrs. Parry; she simply understood it was a debt, and that it came off.

Q. You made the usual verification to your income tax return? A. Yes, of course.

Q. And she made verification of hers?

A. I think they are fairly within the terms of the requirements.

Q. If this was a separate loss of Mrs. Shute, it was properly deductible from her separate property tax, if any.

A. The result to us was exactly the same; that is the reason it was done that way. I didn't go into details with the bookkeeper. It was a matter I was

(Testimony of George W. Shute.)

somewhat ashamed of because it had cost her that amount.

Q. I think the note should be produced as an asset of the estate.

(Arguments by counsel and referee.) [678]

A. I will produce the note.

Q. There is a note of Charles Pinyan which is deducted as a bad debt in your income tax return for 1927,—$75. A. Yes.

Q. Have you that note? A. No.

Q. The note has been destroyed?

A. Yes. He was the son of the man who used to be City Treasurer. He went to a loan concern and borrowed the money on my endorsement; I paid it. I don't know where he is or anything about it, and I threw away the note.

Q. That was about when?

A. It seemed to me the money was borrowed about a year ago; I don't remember the date I paid it. It was due a long time before I paid it.

Q. I don't find anything in your checks paying this note, or at least that I can identify; can you place the date?

A. I might be able to locate the date; I don't remember whether I paid it by check or not.

Q. Was it in 1927 or 1928?

A. I think it was in 1927; I am sure it is a year ago at least.

Q. There is something here to Clayton Bennett.

A. I advanced a little money to him; he was sick.

(Testimony of George W. Shute.)

I just gave it to him; I knew I would never get it back.

Q. In your schedule here you report a commission on sales, $1,000 to Wesley Goswick.

A. I think that is wrong. I was under the impression that all I ever got from Goswick was this $500, but in thinking it over he paid me $500 more; he owed me for material and stuff which I had furnished for some claims we owned out south of Globe; we did a lot of work and I [679] put up the money. Then he finally sold the claims, he gave me back the $500; that other $500 should not be in the income tax return.

Q. I am going by the return.

A. I didn't have any commission at all.

Q. There was a sale made by Goswick?

A. A conditional sales—

Q. And you were instrumental in some way in making that sale?

A. No, the sale was made through a man named Henderson, of Miami.

Q. What was the amount?

A. $200,000. I handled the papers so I know about it.

Q. Do you know the name of the purchaser?

A. I think it was the Tonto Mining Company,—New York people.

Q. Was it an Arizona corporation?

A. No, I think it was a Maryland corporation.

Q. About what was the date of that sale?

(Testimony of George W. Shute.)

A. It was about December, 1927; I think the first payment was due in June, 1928.

Q. Your best recollection is that in December, 1927, you received $1,000 from Goswick?

A. It was along there close. In order to understand that you will have to understand the transactions. The first transaction I had a lot to do with. That was an option made to a fellow,—I can't think of his name, but the man I had most to do with was an engineer named Bedford. I took care of the preliminaries of that sale through Bedford, some time in the latter part of 1925 or 1926; I don't remember; that was the first deal. Under the contract drawn by me the company Bedford represented was to go on [680] these claims and put on certain improvements and machinery and was to make certain payments. I think the first of these payments fell due in September or October of that year, whatever that year was. They paid a certain amount down—I think $5,000 or $6,000. They went into possession and built a lot of houses and put on machinery and had made a first payment on the option.

Q. That was the first option?

A. Yes. They threw the option up in October. That was the one where I stopped them from moving off the stuff. Thereafter it was sold to the Tonto people.

Q. So that sale was made subsequent to October, 1926?

A. The sale that now exists, yes.

(Testimony of George W. Shute.)

Q. What payments have been made on the sale to the Tonto Mining Company?

A. They paid $5,000 down. I think that payment was in December, but I do know that the payment made in June was $82,500, because that was paid just a short time ago.

Q. The $5000 was paid in October, on the execution of the option?

A. I think I am a little off on my dates. I believe that was made before June, 1927.

Q. Anyway, there have been three payments made, the last made in June, of $72,500? A. Yes.

Q. The first was $5,000? A. Yes.

Q. The second you don't know? A. No.

Q. Was it a large sum?

A. It was a very substantial amount. [681]

Q. If it should become necessary to ascertain that amount, who could testify to it?

A. Mr. Foster, who represented the Tonto Mining Company, or the Old Dominion Bank.

Q. Was it handled as an escrow? A. Yes.

Q. Through the Old Dominion Bank? A. Yes.

Q. Referring again to the income tax return of 1927, I notice among your deductions, taxes paid of $104.10, and in the explanation thereof you have, Globe, $152.60, taxes one-half of community, and you deduct one-half of $104.10 from your taxes; is that correct?

A. If you mean by that the property the tax was paid on was community property, it is not correct; that is simply the way Mrs. Parry made it up.

(Testimony of George W. Shute.)

Q. But it is reported on this income tax return sheet as taxes paid on community property at Globe? A. That is what it says, isn't it?

Q. I want it for the record; you can look at it.

(Witness examines income tax return sheet.)

Q. It says one-half community is $104.10, and refers to the dwelling-house in Globe about which you have testified in previous hearings; isn't that it?

A. I don't believe I paid any taxes on the other lot at that time.

Q. Again referring to your deductions, I will call your attention to the explanation of the deductions for depreciation of the dwelling-house in Globe, cost given as $6,500; previous year's deduction of $650, and this year $325; and will ask you if that was not deducted from your income tax return? A. Yes.

Q. The other half, being $325, was deducted from the [682] income tax return of Mrs. Shute, was it not? A. It was.

Q. I will ask you if it was not a fact that the deed of record in Gila County for this house stands in the name of Jessie M. Shute without any recitation of its being separate property.

A. I haven't examined the title. I know it was deeded to her originally.

Q. I will ask you if, when the note and mortgage were signed, payable to Mary E. Holmes, did you not sign that note and mortgage as principal, as well as the signature of your wife being thereon?

A. What do you mean by the word "principal"?

(Testimony of George W. Shute.)

Q. Well, never mind that word; did you sign the note and mortgage? A. Yes.

Q. Each of them were signed by yourself and Mrs. Shute?

A. Yes, we would have had to do that to get the money; that was part of the purchase price.

Q. And since that time you have made one payment to Mary E. Holmes from your bank account of $3,000 on that mortgage?

A. If that is the amount shown by the check it is true.

Q. You have made several other similar payments? A. Yes.

Q. I will ask you if, from the time of your adjudication in bankruptcy you have collected from the firm of Armstrong, Lewis & Kramer any sums on fees which were pending business at the time of the final adjudication.

A. I think there is one small check—$200 or something like that. [683]

Q. That is all? A. I believe that is all.

Q. I will ask for an order directing that that be paid into court.

A. There is no question about that. I will waive the order as to that. Wait a minute—maybe I am going a little fast,—no, that is all right.

Q. According to the statement furnished me, you received during the year 1927 from Armstrong, Lewis & Kramer $15,250.20. I will not ask you to accept this figure as correct; you can verify it.

A. Yes.

(Testimony of George W. Shute.)

Q. According to the statements furnished me for the same period of bank deposits, you deposited only the sum of $11,028.43. In addition thereto you have testified to receipts from Goswick of $1,000 and from Mr. Wentworth of $995.

A. $1395, that was.

Q. $995 on this particular check. We have here checks to cash during the same period of $1700; a check was testified to by Mr. England as having been delivered to you of $760, making a total of $8,682.73, of which we have no explanation from the record furnished us as to the disposition thereof. Can you account for that? That is for the one year, you understand,—1927.

A. Well, $1400 of that, of course, has no place there at all. It would probably take some search and some thought to account for the rest, but the checks I turned in and the bank balances turned in ought to balance fairly closely. I did all my business in the manner I have indicated here, and while there might be some slight confusion, on the whole it ought to be very close to the actual sums. [684]

Q. I want to call your attention to the fact that the Wentworth check of $995 was deposited in the bank, as also the sum from Goswick; we have accounted for the check of $995 which was given to Mr. England on the Wentworth car, and it still leaves that amount unaccounted for.

A. Well, I can't give you the amounts now; I don't know that I ever could. The money came in and it went out, and that is all I can say about it.

(Testimony of George W. Shute.)

Q. Now, you heard Mr. England's testimony about $1195 being received for the sale of the Hudson car owned by you together with a cash payment of $100 and a note for $100—this transaction being in October of last year.

A. I tried to follow his statement as closely as I could. I don't remember about any note.

Q. Then you paid $250 immediately following that on the new car.

A. I think I stated that that was paid on the Essex.

Q. To refresh your memory, I will call your attention to the fact that you testified that you paid out the Essex in September by check of $250.

A. If I did, that is probably right; but I don't think I paid any $250 on the Hudson; I think those payments were on the Essex.

Q. The Essex car is entirely paid for? A. Yes.

Q. What was the price of the new Hudson car? Wasn't that $1535? A. The price was $1765.

Q. I mean the price to you?

A. That isn't my understanding of it. [685]

Q. The books will explain that, his books, I mean.

A. The understanding was when I bought this car that the amount of the throw-off was unascertained and unknown. I expected to get about 60% on the dealer's purchase price thrown off, but have never had any understanding with him except in the most general way.

Q. Anyway, the price was not in excess of $1535?

(Testimony of George W. Shute.)

A. It ought to be pretty close to that.

(Examination by Miss BIRDSALL.)

Q. Referring to the check for $250 made payable to Mr. England dated November 26, 1927, about which I questioned you at the last yearing, and to Mr. England's testimony at the last hearing. I had been questioning him regarding Mrs. Shute's Essex, and he said, "When we would get all the money, we would get $775." Then I asked him when this $250 was paid, and he said September 6th; that the bill was August 31st. Then I asked him if Judge Shute had made a subsequent payment of $250, and he said yes, on November 26th, 1927, but that was credited on the Hudson car.

A. I don't think I ever paid $250 on the Hudson car; I think that finished the payment on the Essex.

Q. You think that regardless of what he testified?

A. Yes.

Q. You testified then, after I had called your attention to the fact that there were two $250 checks, that the first one completed the payment on the Essex.

A. We would be able to figure it out from Mr. England's sheet here.

(Witness examines paper.) [686]

On August 31st the coach was purchased. The first payment was $250 on September 6th. I think the price of the coach was around $900, and I think we got a trade-in on her other little car of something like $400, so you can see that the $250 in No-

(Testimony of George W. Shute.)

vember was on the Essex, or else the Essex is not paid for, and I know it *is* paid for.

Q. As to this car which you gave your mother—

A. I say I gave it to her—it was like this: Mother had the old Hudson which she traded in for $400, and I gave a note for $660 and am making the payments for her.

Q. That is not material here. We can eliminate the last two items of $1060 on the credit side and the last item of $1060 on the debit side, as being the record up to the time of bankruptcy.

A. I think so.

Q. How do you account for the fact that this account of Mr. England's is balanced except for the sum of $14.50 still due?

A. This is what they did. When he sold me these cars, we had an understanding about this throw-off; I think he would throw off about twenty per cent, or about what his commission would be on the Hudson. This isn't true of the Essex, on which we split the difference. When the bookkeeper entered it up, he entered it as a cash item instead of commission.

Q. He makes a charge to you of $1535 for that car. A. Yes.

Q. There is a credit over here (indicating on sheet) concerning which he testified on the car he sold you previously—$100 is the first one; then $1185, which was a credit, then $100, and then this $250, which balances the charge of $1535; he has no charge against you at all except $14.50. [687]

(Testimony of George W. Shute.)

A. It looks that way from that, but I don't understand it.

Q. You will recall you testified that you didn't know what was still due on the car.

A. I don't recall; I don't know myself what is due.

Q. It looks as though you don't owe him anything.

A. I have never had an understanding with him as to what his discount was. I gave him this conditional sales contract to protect him.

Q. According to his own books, the car is paid for.

A. Except you can see there is no account taken of this throw-off, but I know it is there.

Q. Well, we will get further explanation from Mr. England. He testified regarding this, and it seems to me the books confirm it.

A. It doesn't make any difference whether the $250 went on the Hudson or the Essex; I know the Essex is all paid for.

Q. He testified that the $250 payment in November was credited on the Hudson car. We will let that go for the present.

Now, at the first hearing when I questioned you regarding the notes of Mr. Mackay, you were dubious about the original amount being $20,000; you said it was $17,000; I have the original note here and will ask you to look at it.

(Witness examines note.)

A. My understanding was that the purchase price of that block of stock was $17 a share; that would have made the amount of the purchase price $17,-

(Testimony of George W. Shute.)

000; I don't know how it happened that the note was for $20,000. [688]

Q. But that is the original note signed by you and Mr. Mackay, is it not? A. Yes.

Q. I will ask that this note be put into the record here and attached to the original claim; there is a second note dated December 30th, 1920, for $19,650.95; there is another note signed July 2, 1921, for $19,978.70, signed by you and with a waiver of the statute of limitations on the back; this is your signature, is it not?

(Witness examines note.)

A. Yes.

Q. And on the back? A. Yes.

Q. I will ask that these notes be attached to the original claim.

(Notes handed to referee.)

Q. Now, as to these bank statements, June 28, 1927, showing bank deposits for that time. Referring to the statement from Armstrong, Lewis & Kramer to you, I refer to payment of June 6th, 1927, $6,000; this doesn't appear in the bank deposits; can you account for this $6,000?

A. As I remember I had drawn on that payment for some little sums of money.

Q. What I want to know is where it went?

A. On June 6th was evidently a deposit for $500.

Q. But how would you handle it, if you received such an amount?

A. I would take it down, or send it down, and deposit it, less certain amounts I would keep out in

(Testimony of George W. Shute.)

cash; there should be some sort of a record of that on that date. [689]

Q. That is exactly what I want to get at. There are many smaller discrepancies, but this is several thousand dollars, and you could not have carried that amount around in your pocket.

A. No, I should say not. On June 8th I deposited $465.00.

Q. Where was this money in the interim; I cannot trace it in your accounts.

A. You can trace a large part of it.

Q. There is a deficiency of several thousand dollars.

A. Between June 6th and June 11th there is $1165.90 deposited.

Q. There seems to be quite a large deposit the latter part of June.

A. Well, why I would be carrying that around I don't know.

Q. Well, you are the only person who can explain it.

A. I cannot explain it. Ordinarily, as I have told you, I would take out a certain amount for the house, and a certain amount for myself, and deposit the rest, and check on it for the payment of bills that were not paid at the house. That is the way I have always done, and why I should be carrying that amount until June 24th I don't know.

Q. A large part of it wasn't deposited then.

A. About $4,000 was deposited.

(Testimony of George W. Shute.)

Q. Then you received $300, and on July 6th you received $875.00; was that $875 deposited on July 6th?

A. There is no deposit on July 6th; on July 22d there is a deposit of $500.

Q. You had no other place where you deposited money? A. No.

Q. Did you make any of these deposits in the savings account? [690]

Q. Yes, I did that frequently. For instance, I would get a check of $50 from this house in Globe; I would try to add a like amount to it, and sometimes I would do that; and then again sometimes I would have to take the $50 check and use it; then I would make a larger deposit to even it up.

Q. Taking this statement on along here, there was a payment on October 3d, 1927, of $500; was that deposited? A. I don't see it here.

Q. You have no way of determining, Judge Shute, what became of the difference between these checks and the deposits, other than as you have testified?

A. No, if you go through these carefully, however, you will find that they balance fairly well. One year they might be long one way, and one year long another, but if you take the whole account you will find that it balances up fairly accurately.

Q. I have been taking it for one year. It would not be fair to go back into the 1926 deposits for sums you got in 1927. You couldn't deposit them before you got them.

(Testimony of George W. Shute.)

A. If you add up the amounts of my deposits and balance them against the checks that you have drawn, they must be pretty close together, as I have no other deposits.

Q. You could not have checked out anything that wasn't in the account of the amounts received in 1927 and the amounts checked out there is a discrepancy of close to $8,000.

A. Well, go down into 1928, and see what that shows.

Q. That wouldn't affect this.

A. If the amount in 1928 were short, it would be taken out.

Q. In 1928 there is also a less amount in the bank than what you received from Armstrong, Lewis & Kramer; it shows [691] something like $400 more received than was deposited, so there could not have been anything deposited that would make up for that amount missing in 1927.

A. I cannot remember a single cash transaction that involved a very large sum of money.

Q. And you had no other place where you deposited money?

A. No other place; I have no other bank account, no other checking account.

Q. Well, you are the only one who can explain the mystery.

A. I may be able to think of it, but I can't now. I don't know a single cash transaction.

Q. You would be taking quite a chance running

(Testimony of George W. Shute.)

around with several thousand dollars in cash in your pocket.

A. Yes, especially the way I run around.

Q. I don't know of anything else I want to ask.

A. Let me tell you about that Creed stuff; I know you will want to ask about that.

Q. Well, tell us about it.

A. Creed is my son-in-law, and he took a notion that he wanted to run a little grocery store—wanted to buy it from a fellow who was selling out; he had an opportunity of taking up a mortgage on a piece of land and paying $1500. Virginia came over and talked Mrs. Shute out of that amount of money.

Q. That was only three days before you filed your petition?

A. I don't remember the date. She asked me what I thought about it, and I told her that was quite a considerable amount of money, but she went ahead with it and took a note back.

Q. Where did that money come from?

A. Out of her savings account; it was all in one sum. [692]

Q. I want to ask you about this Geare matter. You said that out of this money you borrowed from the bank in April you paid $200 to Miss Geare in cash. How did you send that to her?

A. She was here. She had stopped off here, and that was one of the things that made me get the money from the bank?

Q. How much did you owe her? A. $200.

(Testimony of George W. Shute.)

Q. In the checks shown here, there is one in February and one in March of this year, each for $50, and then there are other smaller payments to her.

A. There should not be. Those two are amounts I sent her to pay for some sort of a machine that she wanted to get in Los Angeles.

Q. I saw some $20 checks, but I noticed two $50 payments, one in February and one in March; the latter one was just a short time before you testified that you paid her this $200? A. Yes.

Q. Then you overpaid her?

A. Well, I had never paid her a cent of interest, and I had used it since 1921. She wrote and asked me for it at the time of the loan; and then she asked me if I could not get the loan if she sent me the Old Dominion stock. So I went to see Sylvan Ganz and it went along and the note fell due and the stock was sold for it.

Q. Is that shown on the discount sheet?

A. I think so.

Q. Did you pay any of the amounts on which you signed as co-maker? A. No, she paid all of it. [693]

Q. Was that secured by Iron Cap stock you had?

A. No, that was hers.

Q. That wasn't the Iron Cap stock you had?

A. No, that had nothing whatever to do with that; it was independent of that altogether.

Q. Do you owe her any money at the present time? A. No.

Q. Is she here now? A. No.

(Testimony of George W. Shute.)

when payments came in from this house, sometimes I would use them and sometimes I would deposit them in her savings account. Sometimes I would have to use some of it, but I would try to make deposits to keep her even; but that represents money she has saved by her own work and from proceeds of this house at Globe, and if that isn't her separate estate, then I don't know what constitutes a separate estate.

Q. We will make an issue of that. Then I think this Essex car is community property.

A. If you are to make an issue of that, you don't want to overlook the fact that the original Essex was about two years old,—the one I gave her at Christmas-time.

Q. Now, as to the Hudson, I think that is also an asset of the estate.

A. There is no question about. Whatever there is in it, you can appraise it and sell it.

Q. I think we should have an order from you on Mr. England to deliver that car to the trustee.

A. I am not going to give any such an order as that, but here is what I will do; you get hold of him and see what is due on the car; we will appraise the car for whatever it is worth, and whatever the difference is I will pay that, and—

Q. I think so far as the testimony and the records show, every dollar on that car has been paid. [696]

A. Well, if I owe him nothing on the car, there is no reason why it should not be appraised.

(Testimony of George W. Shute.)

Q. Of course we have the question of the bank's right to the car.

A. I had to urge Sylvan Ganz to take the mortgage on the car; he really didn't want to take it; said it wasn't good policy for the bank to do so. (Examination by Miss BIRDSALL.)

Q. Why did you want to give it to him then?

A. At that time I had in mind that I was going to fight this thing out. I wanted this money to clear up my debts as well as I could and I wanted to protect the car so people wouldn't be coming back on it. Later, and after talking it over with older and wiser heads, they advised me not to fight it, and I have followed their guidance.

Q. You intended to put the car away so Mr. Mackay couldn't realize anything out of it?

A. I never thought of that at all; I knew he couldn't possibly touch it. That was furtherest from my mind; I made up my mind that he would never get a look in. But I talked it over with my attorneys, and they said I had better get out of it the easiest way I could, and this seemed the easiest way.

Q. You had not decided on bankruptcy then, when you borrowed this money?

A. No, I did not decide on that until I had talked it over with members of the firm.

Q. Do you recall that at the time you were negotiating regarding the possible settlement of this claim that you told me, as a reason for wanting the matter to go over until October, that the firm was

(Testimony of George W. Shute.)

in a state of [697] disruption and that you would not know about a continuation of the partnership, and that was the reason we postponed all action until October? A. I may have told you that.

Q. It was the latter part of June or July.

A. If that was true, then it was due to the fact that Mr. Moore was then threatening to go out. I know there was a blow-up and there was some talk of his going out; he had announced his intention of doing so. I was probably more responsible for talking him out of that than any other member of the firm.

Q. You will recall that I wrote you in November, stating that unless you accepted the offer of settlement of $6,000 to take up this indebtedness that litigation would undoubtedly ensue; you received that letter about that time? A. I think so.

Q. On the 25th of November this conditional sales contract seems to have been put of record.

A. That had nothing to do with that. Those were transactions that had run along with England all the time, and had no connection with this matter whatever.

Q. And that time last summer, when you said that if I brought suit on this I would never realize a cent, you did not contemplate bankruptcy then?

A. I did not.

(Examination by Mr. NEALON.)

Q. According to my construction of the law, any gifts made during insolvency are void, and I would like to have a statement of all gifts made by you

(Testimony of George W. Shute.)

during the [698] period of insolvency, in order that the property may be located. My construction of the law is that anyone who is insolvent has no right to make a gift, and it can be objected to by any creditor before bankruptcy proceedings, and by the trustee, who succeeds to the rights of the creditors.

A. And you say that any gifts made by me after the falling due of this note in 1919 is void?

Q. That is my construction.

A. I don't think that could possibly be true.

Q. You are probably as familiar with the law in that regard as I am. A. No, I am not.

Q. I think we are entitled to that statement.

The REFEREE.—As a general matter of law, that is true. If a condition of insolvency exists, any gift or sale would not affect the creditors.

A. It could not exist here as to any claim because no claim existed until this note was paid. There would be no way of determining whether I was insolvent or not until that situation came up. If we should follow that down, then I would always have been insolvent, because I have always owed money I could not pay. In other words, if I make a present to anyone during my life it would be seized in satisfaction of this debt, which did not occur until 1925 or 1926; is that what you hold?

Q. The trustee is liable on his bond if he does not use due diligence in uncovering assets. I think

(Testimony of George W. Shute.)

I am entitled to the statement I have asked for. [699]

A. Well, there is the little car I gave Mrs. Shute two years ago Christmas-time; and the phonograph.

Q. I did not mean to exact an answer from you at this time on this subject.

A. I will answer it anyway. I can't think of anything else. The amount of money I have given away is legion, $2, $3, $5, at a time, here and there.

(Examination by Miss BIRDSALL.)

Q. You testified to $100 you gave Eileen Whitlow? A. That is one of those items.

Q. You testified that was a gift.

A. Yes, but it would be impossible to follow that up; there is no way of determining where that is.

Q. She is a teacher in the schools here now, isn't she?

A. She teaches at Osborn. Then there was the setting for Mrs. Shute's ring.

Q. Articles for ordinary *person* use are excepted, I believe, such as clothing.

A. Then at Christmas-time, of course, we always gave a lot of stuff.

(Examination by Mr. NEALON.)

Q. I had not intended to inquire about anything personal or private; I am merely trying to clear my own skirts as trustee.

A. Well, I cannot think of anything else.

The REFEREE.—Have you enumerated all of the things that you think belong to the estate now, Mr. Nealon?

(Testimony of George W. Shute.)

Mr. NEALON.—So far as my personal knowledge goes. These things, so far as have been disclosed by the examination and by the records. The record discloses that the title to the [700] house in Globe is in Jessie M. Shute, but no recitation is made that it is separate property; the larger part of the consideration is also shown by the record as being a purchase-money mortgage which was and still is an obligation of the bankrupt, and that this house is community property, at least it is so far as appears from the record.

A. Evidently what I had to say about it doesn't bear very much weight.

Q. I think I could take your own statements, and get a judgment on that question.

A. My interpretation of the law would be as to what the understanding was. If there is an agreement between two people as to what is and what is not separate property, that controls.

Q. That would depend on what interest the creditors have. A. They have no concern in it.

The REFEREE.—The facts control, as to community property, and that is all there is to it. An agreement could not affect existing facts.

Q. There is no question now, as to the phonograph? A. No.

Q. And the Hudson car?

A. Except as to the conditional sales contract.

The REFEREE.—We handle those conditional sales contracts constantly.

(Testimony of George W. Shute.)

Q. So far as you are concerned, then, the trustee can have possession of that car?

A. No, sir. I have turned it back to England, but I do expect to pay the car out and to own it, and I wish to arrive at an understanding about it. I want the car. [701] I want to use it, as I need it badly. I am telling now what I would rather have done; I naturally want to save all I can.

Mr. NEALON.—For the present I will submit it as an issue; we may be able to make an adjustment of it, but the car must come in as an asset of the estate; it must be appraised by the appraisers, but if you want the car we may be able to come to some agreement in regard to it. I simply want to get in the assets of the estate, that is all.

A. You send the appraisers down to appraise it, and I will find out what is owing on it, and there won't be any trouble at all.

Q. The Essex car is an issue, the savings account is an issue, the $250 payment from La Prade.

A. Well, I will think that payment over; I feel that that is money that was prior to this litigation; legally I don't know what the situation is.

Q. The Globe property is an issue.

A. I don't know about that, except in the most general way.

Q. There will be plenty of time on that. The rents on the property at Globe would have the same status as the property itself—I mean the rents since the adjudication and they will follow the decision in this matter. On the say prior to bank-

(Testimony of George W. Shute.)

ruptcy you paid your rent on your residence here in Phoenix. Payments on leases are part of the assets of the estate.

A. I have a yearly lease. I pay the rent monthly.

Q. Are the first and last months rent paid?

A. Yes.

Q. Then I think there is some asset in the estate as to that. A. What could it be? [702]

Q. The value of that would have to be determined. As to those payments made in advance on the premises, I don't know; on the 15th you paid up to May 15th, and in addition to that there is also a month already paid at the close of the lease.

A. They would own that.

Q. But you would be entitled to possession of the premises.

A. I wouldn't be if I didn't pay my rent.

Q. On the date of the adjudication, the lease and all of the rights under it passed to the trustee.

A. That is right as a legal proposition. Of course the money I have paid in increases the value of the lease, so it wouldn't make any difference. I imagine the value would be what I pay in.

Q. We could rent the place.

A. Not for more than I pay.

Q. We would get the extra month.

A. I don't know about that.

(Examination by Miss BIRDSALL.)

Q. It appears that it is going to be necessary to take the deposition of Mary E. Holmes to deter-

(Testimony of George W. Shute.)

mine the amount due on the mortgage; she lives in Massachusetts, I believe.

A. I do not want her to be bothered in this. I can get the amount for you. She is a very old lady and I don't want her troubled.

Q. Well, I have tried twice to get the amount from you; we must have the amount that is due on it. I would like to ask for a continuance until October; there may be some other matters to go into.

The REFEREE.—The meeting should be kept open until all the examinations are closed.

Hearing continued until September 26th, 1928. [703]

The following are copies of exhibits attached to hearing before referee in bankruptcy on June 15, 1928: [704]

Form 1040.

INDIVIDUAL INCOME TAX RETURN.

for Calendar Year 1927.

G. W. Shute.
309 N. B. A. Bldg.
Phoenix, Maricopa (County), Arizona.
Occupation, Profession, or Business—Lawyer.

1. Are you a citizen or resident of the United States? Yes.
2. If you filed a return for 1926, to what Collector's office was it sent? Phoenix, Arizona.
3. Is this a joint return of husband and wife? No.

4. State name of husband or wife if a separate return was made and the Collector's office where it was sent. Mrs. G. W. Shute.
5. Were you married and living with husband or wife on the last day of your taxable year? Yes.

* * * * * * * * * * *

7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change—No change.
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? None.

INCOME.

* * * * * * * * * * * * *

4.	Income from Partnerships:		
	Armstrong, Lewis & Kramer, Trustee	11,926.10	5,963.0
	Armstrong, Lewis & Kramer ...	3,257.46	1,628.7
	Above two items being community —½ is returned here and ½ on return of Mrs. G. W. Shute.		

* * * * * * * * * * * * *

5.	Rents and Royalties (From Schedule B):		
	½ returned here and ½ on return of Mrs. G. W. Shute.....		137.5
	[705]		

* * * * * * * * * * * * *

9.	Other Income (including dividends received on stock of foreign corporations): (State nature of income.)		
	(a) Wesley Goswick—Commission on sale	1,000.00	
10.	Total Income in Items 1 to 9.....		$8,729.2

DEDUCTIONS.

Interest Paid	529.00	
Taxes Paid. (Explain in Schedule F.)	104.10	
* * * * * * * * * * * * *		
Bad Debts. (Explain in Schedule F.)	1,360.00	
Contributions. (Explain in Schedule F.)	25.00	
Other Deductions Authorized by Law. (Explain in Schedule F.)	70.00	
Total Deductions in Items 11 to 16.		2,088.10
Net Income (Item 10 minus Item 17)		6,641.18

COMPUTATION OF TAX.

19.	Earned Net Income (not over $20.000)	$7591.78
20.	Less Personal Exemption and Credit for Dependents	3500.00
21.	Balance (Item 19 minus 20)	4091.78
22.	Amount taxable at 1½% (not over the first $4,000 of Item 21)	4000.00
23.	Amount taxable at 3% (not over the second $4,000 of Item 21)	91.78
*	* * * * * * * * * *	
25.	Normal Tax (1½% of Item 22)	60.00
26.	Normal Tax (3% of Item 23)	2.75
*	* * * * * * * * * *	
29.	Tax on Earned Net Income (total of Items 25, 26, 27 and 28)	62.75
30.	Credit of 25% of Item 29 (not over 25% of Items 28, 42, 43, and 44)	15.69
31.	Net Income (Item 18 above)	6,641.18
*	* * * * * * * * * *	
34.	Personal Exemption	3500.00
*	* * * * * * * * * *	

[706]

36. Total of Items 32, 33, 34, and 35 ..... 3,500.00

37. Balance (Item 31 minus 36) 3,141.18

38. Amount taxable at 1½% (not over the first $4,000 of Item 37) 3,141.18

* * * * * * * * * * *

42. Normal Tax (1½% of Item 38) 47.11

* * * * * * * * * * *

46. Tax on Net Income (total of Items 42, 43, 44, and 45) 47.11

47. Less Credit of 25% of Tax on Earned Net Income (Item 30) 15.69

48. Balance (Item 46 minus 47) 31.42

* * * * * * * * * * *

50. Total Tax (total of or difference between Items 48 and 49) 31.42

* * * * * * * * * * *

53. Balance of Tax (Item 50 minus Items 51 and 52) 31.42

* * * * * * * * * * *

SCHEDULE B.—INCOME FROM RENTS AND ROYALTIES.

1. Kind of Property.	2. Amount Received.	***5. Depreciation.	***8. Net Profit.
Dwelling House at Globe	600.00	325.00	275.00

* * * * * * * * * * *

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15 AND 16.

TAXES—½ Community.

City of Phx	15.60
Globe	152.60
Automobile	40.00
	208.20

½ Community is $104.10.

CONTRIBUTIONS.

Community Chest $25.00

[707]

BAD DEBTS.

Chas. Pinyan—Endorser on Note—$ 75.00—Pinyan insolvent
Joseph Noble— " " " 1200.00—Noble insolvent and executed proof
Clayton Bennett— 85.00—Bennett died insolvent

1360.00

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B.

1. Kind of Property***	5. Cost (exclusive of land)	6. Value as of*** March 1, 1913 (Exclusive of land)	8. Amt. of Depreciation Charged off This Year
Dwelling House at Globe, Arizona	$6500.00	$650.00	$325.00
Professional Library	1400.00	280.00	70.00

Form 1040.

INDIVIDUAL INCOME TAX RETURN

for Calendar Year 1927.

Mrs. G. W. Shute.

309 N. B. A. Bldg.

Phoenix, Maricopa (County), Arizona.

1. Are you a citizen or resident of the United States? Yes.
2. If you filed a return for 1926, to what Collector's office was it sent? Phoenix, Arizona.
3. Is this a joint return of husband and wife? No.
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent. G. W. Shute.
5. Were you married and living with husband or wife on the last day of your taxable year? Yes.

* * * * * * * * *

7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change. No change.
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? None.

INCOME. [708]

* * * * * * * * * * * *

4.	Income from Partnerships: Armstrong, Lewis & Kramer, Trustee.....	11,926.10	5,963.05	
	Armstrong, Lewis & Kramer.....	3,257.46	1,628.73	
	The above two items being community—½ is returned here and ½ in return of G. W. Shute.....			
5.	Rents and Royalties (From Schedule B): ½ returned here and ½ on return of G. W. Shute.....		137.50	

* * * * * * * * * * *

10.	Total Income in Items 1 to 9	7,729.28

DEDUCTIONS.

* * * * * * * * * * *

12.	Taxes Paid (Explain in Schedule F).....	104.10	

* * * * * * * * * * *

17.	Total Deductions in Items 11 to 16	104.10
18.	Net Income (Item 10 minus Item 17)	7,625.18

COMPUTATION OF TAX.

19.	Earned Net Income (not over $20,000.)	$5000.00
*	* * * * * * * *	
21.	Balance (Item 19 minus 20).....	5000.00
22.	Amount taxable at 1½% (not over the first $4,000 of Item 21).....	4000.00
23.	Amount taxable at 3% (not over the second $4000 of Item 21)	1000.00
*	* * * * * * * *	
25.	Normal Tax (1½% of Item 22)	60.00
26.	Normal Tax (3% of Item 23)	30.00
*	* * * * * * * *	
29.	Tax on Earned Net Income (total of Items 25, 26, 27, and 28).....	90.00
30.	Credit of 25% of Item 29 (not over 25% of Items 28, 42, 43 and 44)....	22.50
31.	Net Income (Item 18 above).....	7625.18
*	* * * * * * * *	
37.	Balance (Item 31 minus 36)	7625.18

[709]

38.	Amount taxable at 1½% (not over the first $4000 of Item 37)	4000.00
39.	Balance (Item 37 minus 38)	3625.18
40.	Amount taxable at 3% (not over the second $4000 of Item 37)	3625.18
*	* * * * * * * * *	
42.	Normal Tax (1½% of Item 38)	60.00
43.	Normal Tax (3% of Item 40)	108.76
*	* * * * * * * * *	
46.	Tax on Net Income (total of Items 42, 43, 44 and 45)	168.76
47.	Less Credit of 25% of Tax on Earned Net Income (Item 30)	22.50
48.	Balance (Item 46 minus 47)	146.26
*	* * * * * * * * *	
50.	Total Tax (total of or difference between Items 48 and 49)	146.26
*	* * * * * * * * *	
53.	Balance of Tax (Item 50 minus Items 51 and 52)	146.26
*	* * * * * * * * *	

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES.

Kind of Property	2. Amount Received	***5. Depreciation	***8. Net Profit
Dwelling house at Globe, Arizona	600.00	325.00	275.00

* * * * * * * * *

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, and 16.

TAXES.

City of Phx	$15.00
Globe	152.60
Automobile	40.00
	208.20
½ community is	$104.10

[710]

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B.

Kind of Property	***5. Cost (exclusive of land)	***Amount of Depreciation Charged Off	
		7. Previous Years	8. This Year
Dwelling House at Globe	6500.00	650.00	325.00

[711]

ADJOURNED FIRST MEETING OF CREDITORS HELD DECEMBER 27, 1928.

Mr. LEWIS.—I would like to move the appearance of Mr. Moore at this time, as counsel for Judge Shute.

Mr. LEWIS.—I have prepared a statement here from the records of accounts of Judge Shute, just taking these accounts and running through them and preparing from them as complete, a statement as possible to determine from just what sources he received this money and to whom the money was disbursed; just what expenditures—or what amounts, could not be accounted for as far as expenditures are concerned, and just what amounts of income could not be accounted for. This is rather a detailed statement, and while we could examine Judge Shute in regard to each check and go through them that way, I thought it would be far wiser for the court to appoint an Auditor to use these statements and the accounts that are available, so the correctness of this could be determined. It is correct, so far as the records are concerned but I think it would be better for an Auditor to state as to the correctness of them. There are a number of questions I would like to ask Judge Shute as to certain items here before that is done, however. I am sorry to say I haven't enough carbon copies of certain things here, so I will let you look at these before I ask those questions. [712]

The REFEREE.—You mean you want an Auditor appointed for the benefit of the bankrupt, to

furnish a statement of these accounts as they stand?

The TRUSTEE.—I don't think that would be within the province of the court. It is all right to have the bankrupt examine and testify to them, but—

Mr. LEWIS.—I can use this statement. While it is detailed, it is comparatively simple, and I can run down all these items with him and explain each of them, but I felt that it would probably be more satisfactory for all concerned if someone would go over them, someone who was not connected with the case.

Mr. MOORE.—I had in mind that such an Auditor, if appointed, would represent the bankruptcy court and make a report direct to the referee and give him such assistance as he could.

The TRUSTEE.—There is no issue before the Referee where an accounting should be made.

Mr. MOORE.—I thought that was the very point, that he should account for his receipts and disbursements.

The TRUSTEE.—That will be an issue upon the question of discharge.

The REFEREE.—So far as procedure is concerned, if such a request were made it would simply go to credibility. If the Trustee asks that an auditor be appointed, then the Auditor would represent the creditors. There is no [713] objection to *to* appointing an auditor to assist you in presenting your evidence, but so far as being binding upon the court, he would simply be like any other witness.

The TRUSTEE.—I don't think that is necessary.

Mr. MOORE.—We just made the suggestion of an auditor to make a report for the benefit of the trustee and the court; to give such assistance as he could. What are the issues in this case?

The TRUSTEE.—None. This is merely a continuation of the examination of the bankrupt, and we are through so far as the examination of Judge Shute is concerned, and this request was made by his counsel—that he wished to get this explanation into the record. There is no issue to be tried here,—well, there is an issue, of course, concerning four small items. Then there will be an issue, or issue has been joined, rather, in the Federal Court,—that is, before the Judge,—on the question of discharge. Now when that comes up, all of this would be proper, but it cannot come before the referee; it must come before the Judge or the master appointed by him; isn't that correct, your Honor?

The REFEREE.—Yes.

Mr. LEWIS.—We will proceed, then, to examine Judge Shute.

The TRUSTEE.—The trustee has no objection to Judge Shute making any explanation he wants to or file anything he wants to, [714] but we would not want an Auditor appointed to be an Auditor of the court; if an auditor is appointed later, the scope of that audit would probably be a good deal wider than this. Now, Mr. Lewis, pardon my interruption.

(Testimony of George W. Shute.)

(Examination of the Bankrupt by Mr. LEWIS.)

Q. Prior to January, 1923, what was the source of your income, Judge Shute?

A. Would that be before I came down here, you mean?

A. Yes.

A. The main, and practically my only source of income was the salary I received as a public official; as judge of the Superior Court of Gila County.

Q. Did you have any outside source of income?

A. There might have been some, but it would be small—probably on the little investments I made; However, there were more liabilities than assets.

Q. During the period from January 1, 1923, to November 5, 1925, how is your account shown?

A. The first year I had no bank account. I received a salary and the check I received I used as cash in payment of bills; I opened my bank account some time during the second year I was here.

Q. The bank statements will show that. Now, during, the first year you were with Armstrong, Lewis & Kramer, what was your salary?

A. $5,000.

Q. The checks turned over to Mr. Nealon by Armstrong, Lewis & Kramer would show the details of your income? A. For the whole time?

Q. Yes. [715] A. Yes, that is correct.

Q. Now during the period you have been in Phoenix, you have borrowed money from time to time from the First National Bank of Arizona, have you not? A. Yes.

(Testimony of George W. Shute.)

Q. Mr. Nealon, I have a statement here that the Bank has prepared for me. Now I can get someone to go over there and verify the truth of this statement, if you wish.

The TRUSTEE.—This is merely the loan account of Judge Shute?

Mr. LEWIS.—Yes, and the payments on the loans.

The TRUSTEE.—Your statement is sufficient, Mr. Lewis. If it should become necessary later it can be verified.

Q. From time to time, Judge Shute, as Mrs. Shute's house in Globe was rented, you received checks from there?

A. Yes. The checks almost always came to me direct.

Q. Just how did you handle those checks?

A. Sometimes I gave them to her; sometimes I deposited them in my own account; this has been true nearly down to the present year. When her savings account was started more of an effort was made to deposit them in her savings account.

Q. In December, 1927, there is a personal check payable to A. E. England in the amount of $995. That check has been explained in previous examinations, but I will ask you to explain just how you obtained the money in regard to that?

A. That was in December, 1927?

A. Yes. [716]

A. That $900 came out of the $1900 deposit.

Q. You misunderstand me. This $995 was paid

(Testimony of George W. Shute.)

to A. E. England in December, 1927, at the same time as the $1900 which you explained before, but this was in regard to the Wentworth car which you have previously testified to. Will you explain in regard to the receipt of this money; was that your own money? A. The $995?

Q. Yes.

A. That may have been my own money. It was made up of four things, as well as I can remember them, in which I am corroborated by the Wentworths; there was the cashier's check of $400 or $500—I don't remember the exact amount—that probably constituted the first payment on the Wentworth car; then about three times after that they gave me, altogether, a sufficient amount to make up the amount that was paid in on the car. I don't remember the dates or the exact amount, but the check I gave was probably an accumulation of the amounts paid to me.

Q. Were these amounts handed to you in 1927 or 1928?

A. It may have been both; I can't say.

Q. In September, 1926, on the 11th, your bank statement shows a deposit of $500, and on the 17th the sum of $3400; that is all in 1926; can you account for those deposits?

A. Just give me a hint as to how we worked those out.

Q. From what you told me, I gathered that they came out of the money you received from Julian.

A. Yes.

(Testimony of George W. Shute.)

Q. What money did you receive?

A. Just what did I receive?

Q. Yes. [717]

A. I received $5,000.

Q. And these two deposits on September 11th and September 17th, 1926, were these deposits from this $5,000? A. Yes.

Q. What did you do with the balance?

A. As I stated once before, a thousand dollars of that amount I gave to my father and mother; $3,000 went into the mortgage on the home, and $1,000 I spent during that thirty-day period just prior to father's death and after his death; I don't know the exact amount of those expenditures but I know they ran high.

Q. And you testified that you deposited $3400; part of that would be by check. Now, the $1,000 you gave your father and mother, was that money the money you retained out of this $5,000?

A. I retained it out of the $5,000, yes.

Q. You gave certain sums, I understand, to J. D. Armour?

A. Yes, I let him have money from time to time.

Q. About when was that?

A. I cannot fix that very well; it was when he first went to the hospital, and he was in hard circumstances. I could get that very easily.

Q. When you and Mrs. Parry were discussing this, I understood it was about the end of the year 1926 and beginning of the year 1927; although the date he was sick is not important here. I was in-

(Testimony of George W. Shute.)

terested in knowing the amount of money you gave him, and whether it was in cash or by check.

A. The amount was not less than $500 nor more than $650; they were in both checks and cash. [718]

Q. At the time previous to this examination when you were discussing the large check you had received from Armstrong, Lewis & Kramer, as shown by the checks handed to Mr. Nealon by them, there was one on June 6, 1927, for $5,850; the bank statement shows a deposit of $500 on that date; just what did you do with the balance of $5,350?

A. You mean immediately, or ultimately?

Q. Well, as you know, you did not deposit the check, and you did dispose of it in other ways.

A. I know about what I did with it. Some of it I paid on a note to the bank; I paid the Old Dominion Bank out of it some $2,000 or $2,200; the rest of it I think went back into the bank account,—the checking account, although on that I am not clear.

Q. To further explain it—on June 7th, a check for $465.00 was deposited; what was that?

A. Was that the England check?

Q. Yes.

A. Part of that money went into my numerous car transactions; I gave England the cashier's check and he gave me a check in change,—that is Mr. Wedepohl did; England had nothing to do with it; if I remember he was away at the time.

(Testimony of George W. Shute.)

Q. What was the amount of the cashier's check you turned over to England?

A. I think it was $2,000.

Q. Then on June 24th of the same year there was a deposit of $2,968.43; what was the course of that; is that connected with this transaction?

A. I think it was; it was made for the settlement with the Old Dominion Bank on the note I owed up there, and [719] was probably all the rest of that so-called Beardsley fee that remained.

Q. Would that item have been received by you at the time you turned over that $5,850, being in payment of these loans and the cashier's check?

A. I don't get that.

Q. You testified that you had paid certain loans at the bank and made a $500 deposit; and you also testified you received a $2,000 cashier's check which you turned over to England, from which you received as change an amount which was deposited the following day. Now, this $2,968.43—would that be the balance of that?

A. I take it that it was.

Q. In December, 1927, your bank statement shows a deposit of $1900? A. Yes.

Q. Where did that come from?

A. It came from a $2,000 check that came from Goswick in that month; I think it came December 30th or 31st, if I remember correctly.

Q. During this period from November 5th, 1925, to the date of your adjudication, did you have oc-

(Testimony of George W. Shute.)

casion to deposit sums in cash to Mrs. Shute's savings account?

A. Quite frequently; the savings account will show every one of those items.

Q. Judge Shute, for a period of time in 1925, 1926 and 1927, you, I believe, were renting a home?

A. Yes.

Q. We find during that period numerous checks, personal checks, drawn payable to yourselves, on approximately the *d*ame dates of every month; is there any connection between this and your rent? [720]

A. Yes, I think you will find they were all around $75 and were paid to the bank, from whom I rented.

Q. We find, in 1927, a few checks payable to yourselves that seemingly have no connection with your statement as prepared by Mr. Losh. Now, those checks—for what purpose were they used?

A. They may have been used for drawing out cash; I did that sometimes.

Q. Judge Shute, in checking over these accounts, in your checks, as against the payments to the bank on account of loans, and as against Mrs. Shute's savings account, we find occasional checks payable to yourself drawn on the same date as the payment to the bank on account of loan or deposit in Mrs. Shute's savings account; when you were drawing checks to yourself, does it bring to your mind that that check was for the purpose of doing something of that sort, such as depositing in Mrs. Shute's sav-

(Testimony of George W. Shute.)

ings account, and paying the bank, or drawing cash for yourselves?

A. Ordinarily it might indicate a cash transfer either to the bank or to the savings account, if I were making a transfer from my account to the savings account, I did that quite frequently. There might be exceptions to that rule.

Q. I believe that covers practically every question involved. We find there are certain income items, taking the figures directly from these papers, which cannot be accounted for; they amount to approximately $2900. In such cases perhaps Judge Shute can help us. We find, Judge Shute, that from time to time you retained cash and a short time afterwards there was a deposit made, not in the same amount necessarily, but of some amount nearly [721] like it. We can find no source of that, and can find no way of accounting for it.

A. Well, take for instance, I would receive a dividend check from the firm. Up until this year, about half the time I would send that check down to the bank by one of the girls in the office, and have only a portion of it deposited, taking the balance in cash. That cash would be used by me personally, or I would give it to Mrs. Shute for running the house; then another dividend check might come in, and I would deposit the aggregate of this, back into the bank account; that is the way those amounts unquestionably arose.

Mr. MOORE.—They did not represent a separate income?

(Testimony of George W. Shute.)

A. No.

Q. In going over the period here for which we have checks, statements, and such things as would make it possible for us to determine them—that is from November 5th, 1925, up to the time of the adjudication, we find that Judge Shute has retained money out of his various deposits, and in adding up these amounts from the bank statements it amounts to the sum of approximately $7500. During this same period, in looking over his personal checks we find checks drawn to cash. Now, of these checks, some can be accounted for; I have made up a sheet here so you will have something to work from. The ones of which no accounting can be made amount to $2200; that means that in the two and a half years there is about $9500 of which no accounting has been made; in explanation of that Judge Shute has just said that he would retain money from these dividend deposits and give money to Mrs. Shute. Was it your custom, Judge Shute, to give her this money in cash? [722] A. Yes, always in cash.

Q. We find that over this period of two and a half years that over $2,000 is not accounted for. Where did you say that money went?

A. It had gone to take care of household expenses, or had been used by me in some of these wild things, —or things that look wild now, during those years. For instance, money that was given to Bud Armour. I might say that in all this time, in little amounts of two, three, five, ten, fifteen dollars, etc., I was out probably about $50 a month during that whole

(Testimony of George W. Shute.)

time, that would go to Tom, Dick and Harry, not even figuring the larger amounts.

Q. In this statement we have explained the items that did not explain themselves on their faces, and I have one statement here that is more or less a recapitulation of all the information we can gather from these checks, statements, etc. Now, for the purpose of clearing up the differences that we had earlier in the examinations, when some of these things could not be understood, and which we tried to determine from these checks, I feel that if it is acceptable to you, we would like to ask that this be put into the record as being the financial statement of Judge Shute during this period.

The TRUSTEE.—We have no objection to that. May I ask if you wish to introduce the loan sheet as well?

Mr. LEWIS.—Yes, I think so, as so many references are made to it; the savings account is already in, and this will show the Armstrong, Lewis & Kramer statement, which is really a writing out of what we already know. [723]

The TRUSTEE.—There is no objection to that.

The REFEREE.—Statement of receipts and disbursements, consisting of 14 pages received and marked Bankrupt's Exhibit No. 1. Statement of loans and payments thereon, from the First National Bank of Arizona, is also received and marked Bankrupt's Exhibit No. 2.

(Testimony of George W. Shute.)

(Examination of Bankrupt by TRUSTEE.)

Q. From what sources did you derive the information that is incorporated in this statement, Bankrupt's Exhibit No. 1?

A. That is the one you have been talking about?

Q. Yes.

A. I did not prepare that; Orme made that up.

Q. You have examined it?

A. No, we talked it over this morning.

Mr. LEWIS.—I will explain something to you. While it is true you have not examined it, you have examined the sheets from which it was prepared. These sheets I have gone over and asked you about from time to time have been the rough draft from which this was prepared.

A. All right; then I have examined it.

Q. From what source was the information derived that is contained in here and contained in the rough draft?

A. From every source we could come to.

Q. Will you itemize these as best you can?

A. The checks, the stubs, my own memory, research in the bank records, going over the savings account; conversations with people I have done business with; that is the way it was finally made. [724]

Q. It was made up from no book records that you had kept prior to that time, other than the books of Armstrong, Lewis & Kramer and the bank statements and stubs furnished?

A. You mean a separate independent set of books?

(Testimony of George W. Shute.)

Q. Yes.

A. No.

Q. This statement has been prepared within quite a recent period? A. Yes, sir.

Q. About how long a period has it been that you have been working upon gathering the details and putting it into form?

A. I would say two and a half or three months.

Q. Just in a general way? A. Yes.

Q. You testified about the $995 check to A. E. England—that it was made up in different amounts paid to you at different times.

A. Do not misunderstand me, Mr. Nealon.

Q. I merely want to get it cleared up.

A. That check was probably my own personal money. In other words, as this money would come along, in one, two or three payments, I kept it, and then when the whole thing was consummated I turned over my check in that amount.

Q. The $995 payment was made by your own check? A. Yes.

Q. Over some period of time, either before or after you had made this payment to England, you received the money from the Wentworths?

A. Yes.

Q. In what form did that money come? [725]

A. It was a cashier's check for either $400 or $500. I don't know now, and I asked Miss Wentworth only three days ago if she remembered, but she did not remember the amount. The difference between this $400 or $500 she gave to me in three

(Testimony of George W. Shute.)

cash amounts, aggregating $995, which was the final purchase price of the car.

Q. Let me ask you if you are not mistaken in that. That was a Hudson car, was it not? A. Yes.

Q. Isn't the price $1495, or thereabouts?

A. Whatever it was; this was a different kind of a car.

Q. I was merely trying to refresh your memory.

A. Yes.

Mr. MOORE.—You are talking about the Wentworth car?

A. Yes.

Q. Do you remember the amount of it?

A. I think it was $1395.

Q. The difference between your check here of $995 and the purchase price of the car was $400 or $500; do you recall what that was?

A. It was probably a cashier's check.

Q. Wasn't that the proceeds of a car formerly owned by her?

A. No, the car they had, England would not take on trade, but he did take it to sell it.

Q. The total amount paid to you was $1395?

A. Whatever the price of the car was, and I think it was $1395.00.

Q. How do you recall about the time this first $400 was paid to you?

A. It must have been between the 1st of October and [726] the 1st of November for this reason. We had gone hunting and the Wentworths had gone

(Testimony of George W. Shute.)

with me, and we talked then about the purchase of this car.

Q. The purchase followed that trip?

A. Yes, that was the basis of the negotiation.

Q. If my memory is right, your check was dated December 30th or 31st, for this $995; you had paid the $400 previously?

A. I think this cashier's check was when the transaction was first made; it may have been payable to England.

Q. Anyway that particular item did not appear in your bank account? A. No.

Q. Now, is it your recollection that all these payments were made prior to the giving of that $995 check?

A. I am not sure. It may have run over into the next year.

Q. In what form were those payments made?

A. All in cash.

Q. Did you deposit them? A. The cash?

Q. Yes.

A. I don't know; I can't tell. From checking over the deposits I can't tell; it would depend on the dates.

Q. Now, the next item that attracted my attention was the Julian item of $5,000; that has not been mentioned before.

A. I don't believe I testified about that.

Q. The $3400 deposit was new? A. Yes.

Q. Will you just tell us about that transaction.

A. That was involving the purchase of the Monte

(Testimony of George W. Shute.)

Cristo mine. Joe Bandhaur was Julian's field man, a sort of [727] prospector, geologist and mining engineer, and had been employed by Julian for many years. My first touch with it was when Bandhaur asked me to assist him in introducing Mr. Thayer and inducing him to sell the Monte Cristo to Julian. We talked the matter over, and it resulted in the transfer from Mr. Thayer to Julian of a majority of the stock, and during the negotiations Bandhaur said that C. C. would pay $10,000 for putting the deal over, as from the reports on it, this was one of the kind of things he wanted to put on the market. It was finally arranged that if the deal was finally consummated and Julian would pay $10,000, we would split it, $5,000 to me and $5,000 to Joe, and if this should come to pass, he didn't want Julian to know that he was coming in for a part of the commission.

Q. *Do* Julian paid you the $10,000? A. Yes.

Q. And you paid Bandhaur $5,000 of it?

A. Yes.

Q. Had you previous to that time advanced this amount you speak of to Bandhaur?

A. No, that was my first contract with him.

Q. Now, when was that?

A. I believe it was in July or August of 1926.

Q. September, perhaps? A. Yes.

Q. How was that payment made to you?

A. In cash.

Q. In currency? A. Yes.

(Testimony of George W. Shute.)

Q. By whom? A. By C. C. Julian himself. [728]

Q. How was the payment to Bandhaur made?

A. The same way.

Q. In Phoenix? A. Yes.

Q. Then how did you dispose of it, the immediate disposition of it, I mean?

A. The account will show it very clearly, I think.

Q. I haven't examined it.

A. I paid Mrs. Holmes $3,000; then, that was about the time of all the trouble at home, and I gave $1,000 to father and the expense of the three deaths that occurred during that month.

Q. Mr. Lewis was a little too quick for me in asking about that deposit of $3400 on that money some days later.

A. I don't remember the amount.

Q. There was a $500 item?

Mr. LEWIS.—I have made up a sheet here of explanations; it shows as item 82 on Exhibit "B,"

Q. Well, you seem to have those amounts accounted for, so I won't trouble any more about that. Was that the end of your transaction with Julian?

A. No, I have represented him ever since, up to the present time.

Q. That would be Armstrong, Lewis & Kramer?

A. Yes.

Q. Have you ever had any other transactions of a like nature since that time?

A. No, I think that is the only one of that kind.

Q. Now, this cashier's check to England in June,

(Testimony of George W. Shute.)

or about there; for what reason was that given in that form, if you recall? [729]

A. I have told you about the indebtedness to the Old Dominion Bank. I think the aggregate amount of that was something like $3,000; that is my best recollection. I had been talking with Mr. Wilson about a settlement at about this time. The main part of the indebtedness was interest, and he had agreed he would settle on a basis of something between $2100 and $2300. This so-called Beardsley fee came in at about that time, and I didn't want to deposit it as the Bank would learn of it and there I would be without my settlement, so I took cashier's checks for it so it wouldn't appear through the bank.

Q. Then did you have more than this cashier's check that you turned over to England?

A. The accounts will show that. As soon as I made the arrangement with the Bank, I sent the Bank a check for $2,000; I lacked $200 of making the amount, and sent them post dated checks of $100 each to make up the difference.

(Examination by Miss BIRDSALL.)

Q. I think you testified you had loaned Bud Armour between $500 and $650. A. Yes.

Q. As I understand it, that was all repaid by Mr. Armour?

A. It was not repaid. I never loaned Bud this money; he was sick and in bed, without a dollar, and what I gave to him was without a thought of ever getting it back; I knew he would never be able

(Testimony of George W. Shute.)

to get well and I had no hope of ever getting a penny of it back.

Q. I think you testified they were all repaid to you.

A. I surely never testified that he had ever repaid me anything. [730]

Q. I think you stated that it was repaid to you at different times.

A. He never paid me a single penny.

Q. It is in the record, I am sure.

A. If I ever testified to that, I must have been crazy.

Q. This $500 you sent Joe Bandhaur in December, 1926, or 1927, that you testified to—

A. Yes.

Q. Did that have anything to do with that Julian transaction? A. No.

Q. He still owes that amount of $500?

A. No. Joe Bandhaur telephoned me one day about some stock of the Western Arizona Gold Mines; he had a friend who wanted him to put in $1,000 and would guarantee that the stock would go to 50¢; he said if I would risk $500 he would risk $500, to make up the $1,000 and I did it.

Q. Didn't you ever get the stock? A. No.

Q. Then he really owes you the $500?

A. No. I simply put it in with him on this venture; we both lost our money, that's all.

Q. You have no way of knowing?

A. He told me he had.

Q. You have no receipt or anything?

(Testimony of George W. Shute.)

A. Nothing; he may have sent me a letter.

Q. Was that subsequent to the Julian transaction? A. Long after.

Q. Where is Joe Bandhaur now?

A. In Los Angeles, or Nevada, perhaps.

Q. His home is still in Los Angeles? A. Yes.

Q. I think that is all, now. [731]

TESTIMONY OF A. E. ENGLAND, FOR TRUSTEE.

Mr. A. E. ENGLAND testified as follows at adjourned meeting of creditors held May 29, 1928. (Examination by TRUSTEE.)

I have a copy of the order; I have brought the contract; I didn't bring the books. I have a copy of the contract; there are so many of the books. This was last year's business and the books are all stacked away; there was a crowd of people there in the office, and I just had to come away and leave them. This contract is dated November 25, 1927, and purports to be a sale from England Motors Company to G. W. Shute for 1928 Hudson Sedan, No. 495579, Serial Number 799342, new, six-cylinder; the retail selling price was $1775. I would have to look at the sale price to find the selling price to Judge Shute. I presume they would show it. I am not the bookkeeper, and I would be glad if you would hold the meeting down there where we could look at the books; they are last's year's records and they are stacked away in the storeroom.

(Testimony of A. E. England.)

If you could meet at my office some time, at your pleasure, and my bookkeeper could tell you anything you wanted. I am not a bookkeeper, and don't keep those details in my mind.

The TRUSTEE.—The only way we can do this is to have these records produced for the court; this is just as much as court, Mr. England, as if you were in the courthouse.

A. Well, I came here unprepared in that respect. I don't think there have been any payments made on that contract, but I am not prepared to give you any [732] details on it from memory; I don't know whether or not $1500 is due on that contract.

Q. When can you be prepared to produce these books so we can go into this transaction of the cars?

A. When would you want them?

Q. You were supposed to have produced them here at 11:30 this morning.

A. There are only two of us down there. We would just close our business if we did that. Of course if you demand it I will do it.

Q. We want the witness to testify as to what the books show on this. A. I will get them.

Q. Where is that car?

A. In my basement.

Q. How long has it been there?

A. Several weeks.

Q. Could you set any approximate date?

A. I don't know.

Q. Why was it placed in your basement?

(Testimony of A. E. England.)

A. Well, Judge Shute was having some legal procedure, and—

Q. Do you make a claim on it now?

A. It is in my possession.

Q. Do you claim to own that car as your own property, as the property of your company?

A. It is just as much so as it is in any conditional sales contract.

Q. You do not claim to own it except as a contract? A. No.

Q. You do not know what is due? A. No. [733]

The REFEREE.—I think you will just have to bring your books up here to continue this examination.

A. I will have to go down and just close up, then. How long will this hearing last?

The TRUSTEE.—That is hard to tell; it depends on what arises; you could produce the loose-leaf ledger, that is the sheets that pertain to the proceedings with Judge Shute; that would satisfy me for the present, as to the ledger, but the books of original entry and documents and papers in regard to the cars purchased by Judge Shute from you, and records of all cars sold for him by you; I would like those records.

Miss BIRDSALL.—You were asked in regard to the cars of Judge Shute. Judge Shute has said something about an Essex purchased from Mrs. Shute—

A. That is her personal car.

(Testimony of A. E. England.)

Q. We want that record, too.

A. I will bring that then, also.

Q. Also the car that was purchased by the Wentworth's at Globe.

A. I will mark down what you want. You want the sheets pertaining to Judge Shute's transactions?

Q. All transactions of every nature, including Mrs. Shute's car and the Wentworth car.

A. Every customer has a loose-leaf page.

Q. You have a cash-book? A. Yes.

Q. Do you have a sales-book?

A. Just our records. [734]

Q. Well, we want those books. A. All right.

Q. What shows the down payment?

A. The ledger. I will have the bookkeeper come down; I don't know anything about these things; he will have to explain them to you.

Q. You are the witness.

A. Well, I don't know anything about it.

Q. Will this record that you are to bring in show the purchase price of cars that you take in?

A. Yes, this record goes to the Government every year, so it has to show details.

* * * * * * * * * * *

Q. Mr. England, did you bring the books we asked for this morning?

A. Yes, Mr. Wedepohl, bring the books over here.

Q. These are the ledger sheets? (Indicating.)

A. Yes.

(Testimony of A. E. England.)

Q. You have not the ledger here?

A. No, you stated I could bring these sheets.

Q. These are those? (Indicating.) A. Yes.

Q. What is this? (Indicating.)

A. That is the cash-book.

Q. What is this? (Indicating.)

A. That is the car record book.

Q. I will ask you to turn to entry on the cash-book of December 11th, folio C–227, and read the entry as it appears on that page in regard to V. L. Wentworth.

A. Mr. Wedepohl, will you read the entry on that page? [735]

Mr. WEDEPOHL.—(Reading:)

V. L. Wentworth $400.00.

Q. You received a cash payment made on that date? A. Yes.

Q. That doesn't show to whom it was paid?

A. No, sir.

Q. This was apparently for V. L. Wentworth?

A. Yes.

Q. There is nothing to show the form in which this was paid? A. Not on that sheet.

Q. Is there on any other sheet?

A. We would have to refer that back to our deposit slip on the First National Bank.

Q. Do you keep your account in the First National Bank of Arizona? A. Yes.

Q. Does the deposit slip show by whom the check was issued?

A. No, it shows who it was credited to.

(Testimony of A. E. England.)

Q. Turn to entry of January 3d, folio 1; is that a credit to the same account?

A. $995.00; accounts receivable.

Q. What does that mean?

Mr. WEDEPOHL.—The $995 on this last item together with the $400 item mentioned in the other book aggregated $1395 that we got in cash at these two times for a Hudson sedan, 4–door sedan.

Q. I notice this comes under a column marked "Accounts Receivable"; this would mean that this was credited to "Accounts Receivable"; does it, or does it mean merely [736] to V. A. Wentworth on your ledger?

Mr. WEDEPOHL.—The Wentworth account is one of the accounts receivable.

Q. There is nothing on your books to indicate that this was paid in person, or by whom, other than V. L. Wentworth?

Mr. WEDEPOHL. — The bank deposit should show that Wentworth paid it.

Q. Do you keep a copy of the deposit slips?

A. Yes, sir.

Q. But you do not enter on your deposit slips the name of the party giving the check?

Mr. WEDEPOHL.—Just credit it to their account.

Q. You mean on the duplicate deposit slip?

A. The duplicate is the same as the original.

* * * * * * * * * *

Q. I will call your attention to your entry "C. I. T. payments (3) on September 30, 1905."

(Testimony of A. E. England.)

Mr. ENGLAND.—That was the three payments in arrears. Judge Shute took up that contract and he paid that; it was $61.08 a payment.

Q. Who executed that contract?

A. Sheldon Downey, a son of the postmaster at Miami.

Q. And Judge Shute paid that amount there?

A. Yes.

Q. Where on your records does it show the consideration paid for that car.

A. It doesn't show. It was turned over and he made his payments to the Finance Company; he just assumed that contract and paid it out. [737]

Q. So you had no dealings with him as far as that car was concerned? A. We sold it to him.

Q. Did you get any consideration? A. No, sir.

Q. You have nothing from him at all?

A. No, sir.

Q. Do you know whether he paid anyone anything? A. He paid the contract out.

Q. Did he pay anything other than the contract?

A. I sold him the car.

Q. Had you repossessed the car? A. Yes.

The TRUSTEE. — We would like to ask that copies of those sheets be made so they may be filed, in lieu of the originals.

The REFEREE.—Will you do that?

Mr. ENGLAND.—I will make copies of those sheets so they may be filed in lieu of the originals.

(Resuming his testimony.)

I have had four or five car transactions with

(Testimony of A. E. England.)

Judge Shute. The last one was an Essex,—this month, the 18th, a car was taken in as part payment, at the value of $400, and contract taken for $660; that $400 was on a Hudson car not purchased from me; my last transaction prior with Judge Shute prior to that time was November 30th; that transaction begins quite a ways back. Judge Shute had taken up that Downey Hudson coach, and one day a fellow came into my place who wanted a good used Hudson coach. [738] I didn't have one of my own in stock. He wanted to buy a car badly, and I sold him Judge Shute's car. He usually leaves his car with us and walks down to his office, and we had talked several times about getting him another car, and this man was going to leave for Oregon and Washington, and he wanted a car right now, so I showed him Judge Shute's car, without even asking the Judge's permission and worked up a deal with him; I told Judge Shute I had a good opportunity to turn over his car; he asked on what basis, and I said I would make it all right with him. I gave him the discount and this money and he took one of the new sedans. I allowed him $404.47 discount; that was arrived at by reconciling the books of our company. That fellow gave me a thousand dollar bill; I have it yet. I repeat it; I have it yet. I got a thousand from him, but I gave him back about $300. I think the $700 was credited to Judge Shute's account. Then the Judge went bear-hunting and left the four-door sedan in the basement and another fellow came along and he wanted a car.

(Testimony of A. E. England.)

I didn't have one in stock. This was a Los Angeles man and he wanted a Hudson, and we didn't have one on the floor of any description. I went down to the basement and showed Judge Shute's car to the man and he took it. For that I got $1185 out of the Finance Company; we wrote him a contract, got $100 in cash and a note for $100 to be paid later, making $1385, so I realized $1385 on that. When Judge Shute got back I got him another late model four-door sedan, one of the new 28's which were in then.

(Examination by Miss BIRDSALL.)

The Essex which was brought prior to this last one was in August of last year; that is Mrs. Shute's car, [739] and is completely paid for. It is right here. $335 represented contract that came out of Mrs. Shute's old Essex. We took that in and sold it for $335 on contract; we got $90 in a note and $50 cash, that the other lady paid. We haven't cleared up all these details. That is what we would have if we had all our money. Judge Shute paid $250 on that car; that is all he paid; that paid the car out; after we got all the money we got $775.00. That transaction was carried on this sheet that I have been referring to as Judge Shute's account; it was not a separate account from Mrs. Shute's. That $250 payment was made September 6th, I think; the bill was August 31st. Judge Shute made a subsequent payment of $250 on November 26th, which was credited toward the Hudson car. [740]

Creditor's Exhibit No. 31 admitted in evidence

and comprising with creditor's exhibits numbered six, eight, nineteen and twenty (being eight canceled checks introduced in evidence), consists of the following:

(1) Check-book stubs numbered 1 to 643 (those to 634 being to date of bankruptcy, April 17, 1928) of the First National Bank of Arizona, purporting to cover a period from Nobember 14, 1925, through April, 1928. Of these numbered stubs approximately 12 are entirely blank, with no notation denoting they are void, and a large per cent bear no explanation of nature or purpose of payment, a considerable number having thereon only date and amount without name of payee or further notation.

(2) Approximately 780 canceled checks which cover roughly same period as check-book stubs above. The check stubs and canceled checks only partially correspond, for there are approximately 282 unnumbered canceled checks for which there are no corresponding check stubs, and approximately 126 check stubs for which no canceled checks appear. A large per cent of these canceled numbered checks with stubs to match, as well as the canceled unnumbered and stubless checks, are made [741] merely to "Cash," with no memo to designate purpose for which drawn, and of the 126 stubs for which no canceled checks appear, 19 are payable to "Cash," "Bearer" or "Self."

Of these canceled checks for the year 1926 there appear 18 aggregating a total amount of $335.00, payable to "Cash." For the year 1927 there are 65 canceled checks aggregating a total amount of $2296.80, payable to "Cash," and for the period from January 1, 1928, to April 17, 1928, there are 15 canceled checks aggregating a total amount of $717.60 payable to "Cash."

(3) Original bank statements consisting of 25 sheets, and copies of bank statements consisting of 8 sheets. The 25 sheets of original bank statements, together with 2 sheets of the copies, cover statement showing deposits and withdrawals of bankrupt in the First National Bank of Arizona for the period starting September, 1925, and ending April 20, 1928. The other 6 sheets of copies of bank statements cover statements showing deposits and withdrawals of bankrupt in the First National Bank of Arizona for period commencing January 16, 1924, and ending December 12, 1925. The bank statements and copies contain no data except amounts of deposits and withdrawals, and indicate some 66 items of cash withdrawn in the period between November, 1925, and April 17, 1928, for which no check stubs or canceled checks appear. These bank statements show that total deposits in such account from January 16, 1924, to April 20, 1928, aggregate the sum of $38,028.57, and

that the total bank deposits for the year 1926 are $11,595.64, for the year 1927 are $13,801.78, and for the year 1928 up to April 17th are $2,075.00.

(The data comprising this exhibit was introduced in evidence contained in a pasteboard box of the dimensions of approximately 15″x18″x2½″.) [742]

[Endorsed]: Filed Apr. 16, 1929.
Approved and Filed Aug. 27, 1929. [743]

[Title of Court and Cause.]

ORDER APPROVING STATEMENT OF EVIDENCE.

The statement of evidence with statement thereto made by appellants under direction of the Court, having been duly lodged in the office of the Clerk of this court by appellants, the said statement of evidence with amendment thereto hereunto attached is hereby approved by the Court, and is made a part of the record, and the same contains all of the testimony in the case in narrative form except such as is given by question and answer in order that same might be clearly understood.

Where the testimony in the foregoing statement of evidence is set forth in form of question and answer and in the exact language of the witness, it is so set forth under the direction and order of this Court so that the evidence might be clearly understood.

The petition of appellants for transmittal of Ex-

hibit 31 to the Circuit Court of Appeals was denied because unnecessary, and counsel were directed to make a statement of what said exhibit consisted, leaving it to the Circuit Court of Appeals to order same transmitted if deemed advisable.

Dated this 27th day of Aug., 1929.

WM. H. SAWTELLE,
United States District Judge.

[Endorsed]: Filed Aug. 27, 1928. [745]

[Title of Court and Cause.]

PETITION FOR APPEAL TO CIRCUIT COURT OF APPEALS FROM ORDER GRANTING DISCHARGE TO BANKRUPT AND ORDER ALLOWING SAME.

To the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court for the District of Arizona:

Thomas W. Nealon, trustee in bankruptcy of the above-named bankrupt and estate, and J. J. Mackay, a creditor of the above-named bankrupt and estate, each conceiving himself aggrieved in the hearing upon the matter of discharge herein and by the final order and decree entered on the 12th day of January, 1929, in the above-entitled proceeding, overruling the objections of the trustee and creditor herein to the discharge of the bankrupt and the order and decree of said Court granting the said bankrupt a discharge in bankruptcy from his debts, do hereby

petition for an appeal from the said order, rulings and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignments of error filed herewith, and pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided, and your petitioners further pray that the proper order relating to the required [746] security to be required of them be made.

THOMAS W. NEALON,
Trustee.
JOHN L. DYER,
ALICE M. BIRDSALL,
Solicitors for J. J. Mackay,
Creditor of Bankrupt.

ORDER.

The foregoing appeal is hereby allowed upon giving bond as required by law for the sum of Two Hundred Fifty Dollars ($250.00).

Dated February 9th, 1929.

WM. H. SAWTELLE,
District Judge.

[Endorsed]: Filed Feb. 9, 1929. [747]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now Thomas W. Nealon, trustee of the above-named bankrupt and estate, and J. J. Mackay, objecting creditor in the above-entitled cause, and file the following assignments of error, upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the order, rulings and decree made by this Honorable Court on the 12th day of January, 1929.

I.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the First Specification of grounds of opposition to bankrupt's discharge which was as follows:

That the bankrupt herein has committed an offense punishable by imprisonment under the Bankruptcy Act in that he has knowingly and fraudulently while a bankrupt concealed from his trustee property belonging to his estate in bankruptcy, as follows:

> (a) One Hudson car, described as 1928 Hudson Sedan, Motor Number 495579, Serial Number 799342, owned by said bankrupt at the time of filing his petition in bankruptcy, the value of said Hudson Sedan being, to wit, the sum of $900.00.

(b) One life insurance policy upon the life of [748] the bankrupt as follows: Policy No. 3310053, said policy having been issued by the Mutual Life Insurance Company of New York dated May 25, 1924, being one in which he had the right to change the beneficiary without the consent of the beneficiary named therein, and which life insurance policy had a cash surrender value at the time of the filing of the debtor's petition in bankruptcy, of $746.85.

(c) A savings account in the First National Bank of Arizona at Phoenix, Arizona, being Account No. 19061 in the name of Jessie M. Shute, wife of said bankrupt, in which account there was on deposit at the date of filing said petition in bankruptcy, $1162.30, which was the community property of the said bankrupt and his wife, and by further concealing from the said trustee the existence of one promissory note of Joseph E. Noble paid by said bankrupt from said account, and one promissory note for $1500.00 loaned from said account to one Leslie Creed.

(d) One certain contract entered into by and between one Wesley Goswick and the bankrupt on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of $20,000.00 out of the proceeds of the sale by the said Wesley Goswick of a cinnabar mining property to one L. E. Foster for the sum of $200,000.00, and payments having been made to

the bankrupt thereon of the sum of $500.00 on December 8, 1926, $1000.00 on the 8th day of June, 1927, $2000.00 during the [749] month of December, 1927, and subsequent to the adjudication in bankruptcy, in, to wit, the month of June, 1928, a further sum of $8000.00 on said contract, leaving payments amounting to $16,-500.00 due and to become due on said contract to the bankrupt at the time of the filing of his petition in bankruptcy.

(e) The following described real property in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and south half of Lot 5, Block 45, East Globe Townsite, of the value of, to wit, $5000.00, which said property was up to the time that the title thereof passed to your trustee by operation of law on the filing of the bankrupt's petition in bankruptcy, the property of said bankrupt and purchased with funds acquired by him subsequent to the marriage of said bankrupt to his wife, Jessie M. Shute.

(f) One Essex car described as Essex Coach Serial Number 640003, the value of, to wit, the sum of $600.00.

(g) The sum of $995.00, being the amount which said bankrupt received as a payment from one Virginia L. Wentworth for money he paid for an automobile for her.

(h) The sum of $250.00, being the amount of a deposit made by the bankrupt with one Arthur LaPrade during the month of Decem-

ber, 1927, for the purpose of investment and which subsequent to the adjudication in bankruptcy was returned [750] to said bankrupt by said Arthur LaPrade.

(i) One phonograph of the value of approximately $200.00.

The total amount of the concealment of property from your trustee as enumerated above being of the value of, to wit, $28,879.35.

The trustee and the objecting creditor, J. J. Mackay, charge the fact to be that said bankrupt has so concealed from said trustee said property collectively and also as to each separate item of the above-described property.

II.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Second Specification of objections to bankrupt's discharge, which was as follows:

That the said bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following question propounded to him under ex-

amination at the first meeting of creditors, as answered by him, to wit:

Q. You have a car at the present time, have you not?

A. I bought a car when I came down here, [751] a Hudson, from my brother-in-law, and I paid $100 a month on it until it was paid for; then I traded it in on another car from England, and then traded that in on another one, which is the car I have now; there is probably $1,000 due on it.

These objectors charge at the time said question was asked and answered by said bankrupt he had been first duly sworn by said referee and said testimony was given under oath; that the answer above set forth was false and untrue and knowingly and fraudulently made, for the purpose of concealing property from the trustee.

III.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Third Specification of objections to bankrupt's discharge, which was as follows:

That the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false

account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. (Referring to Hudson car owned by said bankrupt at the time of filing his petition in bankruptcy.) You have made no payments except the work you have done for him?
>
> A. That is about the way it would figure out; I don't think I made any cash payments at all. [752]

These objectors charge at the time said questions were asked and answered by said bankrupt he had been first duly sworn by referee and said testimony was given under oath; that the answer above set forth was false and untrue and knowingly and fraudulently made, for the purpose of concealing property from the trustee.

IV.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Fourth Specification of objections to bankrupt's discharge, which was as follows:

That the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has know-

ingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. You did not schedule it? (Referring to Hudson car owned by said bankrupt at the date petition in bankruptcy was filed.)
>
> A. I turned it back.

These objectors charge at the time said question was asked and answered by said bankrupt he had been first duly sworn by said referee and said testimony was given under oath; that the answer above set forth was false and untrue and knowingly and fraudulently made, for the purpose of concealing property from the trustee. [753]

V.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Fifth Specification of objectors to bankrupt's discharge, which was as follows:

That the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered

a false account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. Since that time (January, 1924) how much have you received from the firm's business? (Referring to the firm of Armstrong, Lewis & Kramer.)
>
> A. Well, I can only give an approximation, but I think it is pretty close. I think the first year I received about $5500; that was 1924. In 1925 I received between $5500 and $6000; I think in 1926 it was about $8,000; I think the last year I received somewhere in the neighborhood of $10,000; that is about right, I think.

These objectors charge at the time said question was asked and answered by said bankrupt he had been first duly sworn by said referee and said testimony was given under oath; that the answer above set forth was false and untrue and knowingly and fraudulently made, for the purpose of concealing from the trustee his true income and receipts. [754]

VI.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Sixth Specification of objections to bankrupt's discharge, which was as follows:

That the bankrupt has committed an offense

punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. How much have you drawn from the firm (being the firm of Armstrong, Lewis & Kramer) since the first of the year?
>
> A. I think about $500 a month. There has been no dividend in April.

These objectors charge at the time said question was asked and answered by said bankrupt he had been first duly sworn by said referee and said testimony was given under oath; that the answer above set forth was false and untrue and knowingly and fraudulently made, for the purpose of concealing from the trustee his true income and receipts.

VII.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Seventh Specification of objections to bankrupt's discharge, which was as follows: [755]

That the bankrupt has committed an offense

punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. In addition to that (referring to receipts from the firm of Armstrong, Lewis & Kramer) then, there should be other amounts that you have received in order to make the books complete?
>
> A. That depends on the way you look at it. You will remember I told you about the little block of stock we sold after we came down here. There was also a little Mrs. Shute owned in the Iron—Blossom, I think it was called; there was 100 shares of that. We sold that and I used the money. There may be two or three small instances like that, but except in very small items of that kind, the income was from the firm.

These objectors charge at the time said question was asked and answered by said bankrupt he had been first duly sworn by said referee and said testimony was given under oath; that the answer above

set forth was false and untrue and knowingly and fraudulently made, for the purpose of concealing from the trustee his true income and receipts.

VIII.

That the United States District Court for the District or Arizona erred in overruling and not sustaining the Eighth Specification of objections to bankrupt's discharge, which was as follows: [756]

That the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following question propounded to him under examination at the first meeting of creditors, as answered by him:

> Q. During all of this period (period said bankrupt had been with the firm of Armstrong, Lewis & Kramer) did you receive any large sums of money from any other source, other than those you have testified to?
>
> A. I think I have testified to all of them, either at this hearing or the other one.

These objectors charge at the time said question was asked and answered by said bankrupt he had

been first duly sworn by said referee and said testimony was given under oath; that the answer above set forth was false and untrue and knowingly and fraudulently made, for the purpose of concealing from the trustee his true income and receipts.

IX.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Ninth Specification of objections to bankrupt's discharge, which was as follows:

That the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting [757] of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following questions propounded to him under examination at the first meeting of creditors, as answered by him:

Q. You have no interest in any mining property? A. None at all.

Q. Any mining claims? A. No.

Q. Have you represented any companies over there in any way as counsel from whom you have received fees since being in Phoenix?

A. I cannot think of any. It would be on the books here if I have.

Q. You have received nothing that would not show on the books of Armstrong, Lewis & Kramer? A. I don't think so.

Q. From Globe companies or from interests you have there? A. I don't think so.

These objectors charge at the time said questions were asked and answered by said bankrupt he had been first duly sworn by said referee and said testimony was given under oath; that the answers above set forth were false and untrue and knowingly and fraudulently made, for the purpose of concealing from the trustee his true income and receipts.

X.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Tenth Specification of objections to bankrupt's discharge, which was as follows: [758]

That the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act in that in the course of the proceedings in bankruptcy, when examined before the referee at the first meeting of creditors, after having been duly sworn to testify to the whole truth in said matter by said referee in bankruptcy, he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy, as follows: That he knowingly and fraudulently made a false oath in answering the following questions propounded to him under ex-

amination at the first meeting of creditors, as answered by him:

Q. When was this $500 payment received from Mr. Goswick? A. In December, 1927.

Q. Have you ever received any other amounts from him?

A. Only for fees; they would go into the firm.

Q. This $500 was not fees? A. No.

Q. Have you any interest in these options of Goswick's? A. No.

Q. You do not expect to receive any other amounts from him other than this $500?

A. No.

Q. If he should send you any more money you would be surprised, would you?

A. I most certainly would.

These objectors charge at the time said questions were asked and answered by said bankrupt he had been first duly sworn by said referee and said testimony was given under oath; that the answers above set forth were false and untrue and [759] knowingly and fraudulently made, for the purpose of concealing from the trustee his true income and receipts.

XI.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Eleventh Specification of objections to bankrupt's discharge, which was as follows:

That the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy

Act in that he has knowingly and fraudulently made a false oath and rendered a false account in and in relation to his proceedings in bankruptcy, as follows:

(a) That on, to wit, the 17th day of April, 1928, the said bankrupt subscribed and swore to an oath to Schedule A (being the schedule of his assets filed herein) before R. E. Conger, a notary public in and for the county of Maricopa, State of Arizona, in which he did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy, which schedule was on the 17th day of April, 1928, filed with the United States District Court for the District of Arizona, said schedule showing only one creditor of said bankrupt, namely J. J. Mackay, and that said oath to said schedule was false as to a material fact in that in truth and in fact there was another creditor of said bankrupt, namely, the First National Bank of Arizona, which held a promissory note of said bankrupt for the sum of $750 dated April 7, 1928, which promissory note was at that time unpaid and secured by a chattel mortgage on one 1928 Hudson sedan, Motor Number [760] 495579, Serial Number 799342, executed by said bankrupt on the 7th day of April, 1928, said car not being scheduled as an asset of said estate.

(b) That on, to wit, the 17th day of April, 1928, the said bankrupt did knowingly and

fraudulently before R. E. Conger, a notary public in and for the county of Maricopa, State of Arizona, subscribe to and make a false oath to Schedule B of the schedule of his liability in this estate, in that after being duly sworn he did declare the said schedule to be a statement of all his assets, both real and personal, in accordance with the acts of Congress relating to bankruptcy, in that in said Schedule B, he listed as his entire assets, real estate of the value of Two Hundred Fifty ($250.00) Dollars; books, prints, and pictures of the value of Twenty-five ($25.00) Dollars; deposits of money in bank and elsewhere, of Fifteen and 67/100 ($15.67) Dollars; and certain mining stocks listed as of no market value; making a total of nonexempt assets listed of Two Hundred Ninety and 67/100 ($290.67) Dollars; and exempt property as follows: household goods of the value of Two Hundred Fifty ($250.00) Dollars, and other personal property, consisting of a law library and office fixtures of the value of Seven Hundred Fifty ($750.00) Dollars, when in truth and in fact his said assets at that time were in excess of the sum of, to wit, Thirty Thousand ($30,000.00) Dollars; the omissions of assets from said schedule being more particularly described as follows, to wit:

(1) One Hudson car described as 1928 Hudson [761] Sedan, Motor #495579, Serial #799342, of the value of $900.00.

(2) One life insurance policy upon the life of the bankrupt as follows: Policy #3310053, issued by the Mutual Life Insurance Company of New York, dated May 25, 1924, of the cash surrender value of $746.85.

(3) Savings account in the First National Bank of Arizona at Phoenix, Arizona, being Account #19061, in the name of Jessie M. Shute, wife of said bankrupt, against which account said bankrupt retained the right to check, the said savings account containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1162.30.

(4) One phonograph of the value of $200.00.

(5) The sum of $250.00, deposited by the bankrupt with one Arthur La Prade during the month of December, 1927.

(6) One Essex car described as Essex Coach, Serial #640003, of the value of $600.00.

(7) The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000.00.

(8) One certain contract entered into by and between one Wesley Goswick and the bankrupt on or about the 8th day of December, 1926, under and by virtue of the terms of which the [762] said bankrupt was to receive the sum of Twenty Thousand ($20,000.00) Dollars out of the proceeds of the sale by said Wesley Gos-

wick to one L. E. Foster of a cinnabar mining property for the sum of Two Hundred Thousand ($200,000.00) Dollars, said contract between said Wesley Goswick and said bankrupt in said sum of $20,000.00 being payable to said bankrupt in an amount of ten (10%) per cent of the payments made by the purchaser to said Wesley Goswick at the time said payments were made.

(9) An undivided partnership interest in the assets of the firm of Armstrong, Lewis & Kramer, of which firm the said bankrupt is a member; the interest of the said bankrupt in the assets of said firm being of the estimated value of Five Thousand Dollars ($5,000.00).

That said oath to said Schedule B was false as to a material fact in that said assets of said bankrupt so omitted from said schedule were assets belonging to said bankrupt estate, the existence of which said bankrupt was by said omission concealing from the officers of the Bankruptcy Court in charge of said proceeding.

(c) That on, to wit, the 7th day of May, 1928, the said bankrupt did knowingly and fraudulently before one R. E. Conger, a Notary Public in and for the County of Maricopa, State of Arizona, subscribe to and make a false oath to Schedule B of the Amended Schedule of his liabilities in this estate, which said amended schedule was on the 8th day of May, [763] 1928, filed with the United States District Court of Arizona; in that after being duly sworn said

bankrupt did declare the said amended schedule to be a statement of all his assets, both real and personal, and that in said Schedule B of said amended schedule he listed as his entire assets real estate of the value of Two Hundred Fifty ($250.00) Dollars; books, prints and pictures of the value of Twenty-five ($25.00) Dollars; deposits of money in banks and elsewhere, Fifteen and 67/100 ($15.67) Dollars; certain mining stocks listed as of no market value, and a 25% interest in the net earnings of Armstrong, Lewis & Kramer, as shown on the books of the firm from the 1st day of April, 1927, the value of said interest not being stated; and a 20% interest in the office equipment of Armstrong, Lewis & Kramer of the value of Seven Hundred Sixty-nine and 15/100 ($769.15) Dollars; making a total value of non-exempt assets listed of One Thousand Fifty-nine and 82/100 ($1059.82) Dollars, exclusive of said partnership interest, and exempt property as follows: Household goods of the value of Two Hundred Fifty ($250.00) Dollars; and other personal property consisting of a law library and office fixtures of the value of Seven Hundred Fifty ($750.00) Dollars; when in truth and in fact his said assets at that time were in excess of the sum of Thirty Thousand ($30,000.00) Dollars; the omissions of assets from said schedule being more particularly described as follows, to wit:

(1) One Hudson car described as 1928 Hud-

son Sedan, Motor #495579, Serial #799342, of the [764] value of $900.00.

(2) One life insurance policy upon the life of the bankrupt as follows: Policy #3310053, issued by the Mutual Life Insurance Company of New York, dated May 25, 1924, of the cash surrender value of $746.85.

(3) Savings account in the First National Bank of Arizona at Phoenix, Arizona, being Account #19061, in the name of Jessie M. Shute, wife of said bankrupt, against which account said bankrupt retained the right to check, said savings account containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1162.30.

(4) One phonograph of the value of $200.00.

(5) The sum of $250.00, deposited by the bankrupt with one Arthur LaPrade during the month of December, 1927.

(6) One Essex car described as Essex Coach, Serial #640003, of the value of $600.00.

(7) The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000.00.

(8) One certain contract entered into by and between one Wesley Goswick and the bankrupt on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of [765]

Twenty Thousand ($20,000.00) Dollars out of the proceeds of the sale by said Wesley Goswick to one L. E. Foster of a cinnabar mining property for the sum of Two Hundred Thousand ($200,000.00) Dollars, said contract between said Wesley Goswick and said bankrupt in said sum of $20,000.00 being payable to said bankrupt in an amount of ten (10%) per cent of the payments made by the purchaser to said Wesley Goswick at the time said payments were made.

That said oath to said amended schedule B was false as to a material fact in that said assets of said bankrupt so omitted from his said schedule were assets belonging to said bankrupt estate, the existence of which said bankrupt was by said omission concealing from the officers of the Bankruptcy Court in charge of said proceeding.

The trustee and objecting creditor charge the fact to be that said bankrupt has sworn falsely with reference to said matters so knowingly and fraudulently omitted from said schedules.

XII.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Twelfth Specification of objections to bankrupt's discharge, which was as follows:

That the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act, in that he has knowingly and fraudulently after the

filing of his petition in bankruptcy herein, withheld from the trustee in the bankruptcy estate documents and papers affecting and relating to the property and [766] affairs of the bankrupt, to the possession of which the trustee is entitled, and the possession of which is necessary to the trustee for the purpose of collecting in the assets of the bankrupt estate, said documents and papers consisting of:

(a) One lease in which the bankrupt is the lessee of a residence and lot located at 66 West Lynwood Street, in the City of Phoenix, County of Maricopa, State and District of Arizona, the said lease having had paid thereon by said bankrupt prior to the filing of the petition in bankruptcy herein the sum of One Hundred Fifty ($150.00) Dollars for unexpired rent thereon (with the exception of two days rent at the rate of Seventy-five ($75.00) Dollars per month), the same being an asset of said estate, and the title to said lease having passed to the trustee by operation of law as of the date of the filing of the bankrupt's petition in bankruptcy herein.

(b) One promissory note signed by Joseph E. Noble, dated the 18th day of October, 1927, for the principal sum of Twelve Hundred ($1,200.00) Dollars, payable to the First National Bank of Arizona, signed by said Joseph E. Noble as principal, and by G. W. Shute, the bankrupt, as surety, which said promissory note was on or about the 27th day of February,

1928, paid by said bankrupt, and which promissory note is an asset of the bankrupt estate, title to which passed to the trustee herein as of the date of the filing of the petition in bankruptcy herein by the said bankrupt. [767]

XIII.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Thirteenth Specification of objections to bankrupt's discharge, which was as follows:

That said bankrupt has failed to keep books of accounts or records from which his financial condition and business transactions might be ascertained, and has concealed records from which his business transactions might be ascertained.

XIV.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Fourteenth Specification of objections to bankrupt's discharge, which was as follows:

That at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy, he transferred real property owned by himself from himself to his wife, with intent to hinder, delay and defraud his creditors, such property being situated in the county of Gila, State of Arizona, and more particularly described as follows, to wit: Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite; that

said transfer was accomplished in the following manner, to wit: That the said bankrupt was the owner of the above-described property as the community property of himself and wife ever since the 20th day of December, 1920, when the same was acquired by him by the payment therefor of the consideration for the purchase thereof from the community funds of himself and his wife, Jessie M. Shute, acquired by said bankrupt after his marriage to her, and by the giving of a [768] joint promissory note and mortgage as a part of the consideration for the said purchase of one Mary E. Holmes for the sum of Thirty-five Hundred ($3500.00) Dollars, which promissory note and mortgage was a community liability. That in, to wit, the early part of the year 1928, the said bankrupt, while insolvent within the meaning and intent of the Bankruptcy Act, and not having sufficient property to pay his debts, transferred the above-described property to his wife, Jessie M. Shute, by disclaiming any interest therein in her favor and by relinquishing possession thereof to her, all of which was done in contemplation of bankruptcy and with intent to hinder, delay and defraud his creditors. That subsequent to the filing of his said petition in bankruptcy he has continued to aid his wife, the said Jessie M. Shute, in withholding possession of said premises from the trustee of the said estate, and employed counsel for her to prevent the delivery of same to the trustee

herein and to prevent the payment of the rents thereof to the trustee herein, and by filing a declaration of homestead upon said premises signed by the said Jessie M. Shute subsequent to the filing of said petition in bankruptcy of record in the office of the County Recorder of Gila County, thereby clouding the title of said trustee and carrying out the disclaimer and relinquishment of his right and title to the real estate and improvements as hereinbefore set forth in favor of his wife.

XV.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Fifteenth Specification of objections to bankrupt's discharge, which was [769] as follows:

That at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy he transferred personal property owned by himself to one A. E. England, with intent to hinder, delay and defraud his creditors, said property consisting of one automobile of the value of, to wit, Nine Hundred ($900.00) Dollars, and more particularly described as follows, to wit: 1928 Hudson Sedan, Motor Number 495579, Serial Number 799342; that said transfer was accomplished by delivering the said automobile to the said A. E. England to hold and keep as his own, and to store the same in the building occu-

pied by the A. E. England Motors in the City of Phoenix, Arizona; that said transfer was made in the early part of the year 1928 and was made in contemplation of bankruptcy; that said automobile remained in the custody of the said A. E. England up to and subsequent to the adjudication in bankruptcy of the bankrupt until a time some weeks subsequent to said adjudication, when the same was purchased from the trustee herein by the bankrupt for the sum of Nine Hundred ($900.00) Dollars.

XVI.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Sixteenth Specification of objections to bankrupt's discharge, which was as follows:

That at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy, he concealed and permitted to be concealed personal property belonging to said bankrupt and bankrupt estate, more particularly described [770] as follows: A savings account numbered 19061 in the First National Bank of Arizona, standing in the name of Jessie M. Shute but being the community property of said bankrupt and said Jessie M. Shute, and consisting of funds acquired after marriage by the said bankrupt, of the sum of Eleven Hundred Sixty-two and 30/100 ($1162.30) Dollars, $1000.00 or more of which sum was by the said bankrupt withdrawn

or permitted to be withdrawn from the said account after the same had been the subject of testimony and examination at a meeting of the creditors of said bankrupt held on the 29th day of May, 1928, for the purpose of placing the same beyond the reach of the trustee herein and of the Court of Bankruptcy, and which sum has been secreted and concealed from the trustee herein and the officers of the Court of Bankruptcy, thereby depriving the estate of said bankrupt of said $1,000.00, with intent to hinder, delay and defraud the creditors of said bankrupt.

XVII.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Seventeenth Specification of objections to bankrupt's discharge, which was as follows:

That at a time subsequent to the first day of the twelve months immediately preceding the filing of his petition in bankruptcy, he concealed and permitted to be concealed personal property belonging to said bankrupt and said bankrupt estate, said concealment being more particularly described as follows: By receiving and secreting in, to wit, the month of June, 1928, the sum of, to wit, Eight Thousand ($8,000.00) Dollars, paid to said bankrupt by one Wesley Goswick upon a contract [771] entered into by said Goswick and said bankrupt prior to the filing of the petition in bankruptcy by the bankrupt herein, which said

contract passed by operation of law to the trustee herein at the time these proceedings were instituted, and which sum of Eight Thousand ($8,000.00) Dollars was the property of the trustee herein and collected by the said bankrupt without the knowledge or consent of the trustee herein, and said bankrupt has ever since said time concealed the same from the trustee and the officers of the Bankruptcy Court with intent to hinder, delay and defraud the creditors of said bankrupt.

XVIII.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Eighteenth Specification of objections to bankrupt's discharge, which was as follows:

That in the course of the proceedings in bankruptcy, said bankrupt refused to obey a lawful order of the Court, to wit, the order of said Bankruptcy Court made on the 1st day of May, 1928, requiring said bankrupt to file new schedules or to so amend said schedules theretofore filed by him to conform to the facts and provisions of the Bankruptcy Act; that said bankrupt subsequent to said order filed what was termed an amended schedule, but that said amended schedule did not comply with said order of Court dated May 1, 1928, and did not conform to the facts and the provisions of the Bankruptcy Act in that said bankrupt knowingly and fraudulently omitted from said

amended schedule the following assets belonging to said bankrupt estate, to wit:

(1) One Hudson car described as 1928 Hudson Sedan, [772] Motor #495579, Serial #799342, of the value of $900.00.

(2) One life insurance policy upon the life of the bankrupt as follows, Policy #3310053, issued by the Mutual Life Insurance Company of New York, dated May 25th, 1924, of the cash surrender value of $746.85.

(3) Savings account in the First National Bank of Arizona at Phoenix, Arizona, being account #19061, in the name of Jessie M. Shute, wife of said bankrupt, against which account said bankrupt retained the right to check, said savings account containing on the date petition in bankruptcy was filed, to wit, the 17th day of April, 1928, the sum of $1162.30.

(4) One phonograph of the value of $200.00.

(5) The sum of $250.00, deposited by the bankrupt with one Arthur LaPrade during the month of December, 1927.

(6) One Essex car described as Essex Coach, Serial #640003, of the value of $600.00.

(7) The following described property situated in the City of Globe, County of Gila, State of Arizona, more particularly described as Lots 1, 2, 3, 4, and South Half of Lot 5, Block 45, East Globe Townsite, and being of the value of, to wit, $5,000.00.

(8) One certain contract entered into by

and between one Wesley Goswick and the bankrupt on or about the 8th day of December, 1926, under and by virtue of the terms of which the said bankrupt was to receive the sum of Twenty Thousand ($20,000.00) Dollars out of the proceeds of the sale by said [773] Wesley Goswick to one L. E. Foster of a cinnabar mining property for the sum of Two Hundred Thousand ($200,000.00) Dollars, said contract between said Wesley Goswick and said bankrupt in said sum of $20,000.00 being payable to said bankrupt in an amount of ten (10%) per cent of the payments made by the purchaser to said Wesley Goswick at the time said payments were made.

XIX.

That the United States District Court for the District of Arizona erred in overruling and not sustaining the Nineteenth Specification of objections to bankrupt's discharge, which was as follows:

That he failed to explain satisfactorily losses of assets and deficiency of assets to meet his liability in this, that for the period commencing January 1, 1927, up to and including the date of the filing of his petition in bankruptcy herein, to wit, the 17th day of April, 1928, said bankrupt had cash assets in the form of income and other amounts received by him during said period, of an amount of not less than Twenty-one Thousand Six Hundred Ninety-five and 20/100 ($21,695.20) Dollars; and that after de-

ducting from said amount all expenditures and disbursements thereof testified to by said bankrupt under examination or revealed from such statements and data as have been produced by him in said proceedings, there still remains an amount of not less than Seven Thousand ($7,000.00) Dollars received by said bankrupt during said period of time which is totally unaccounted for, and the disappearance of which said bankrupt has failed to explain satisfactorily or at all. [774]

XX.

That the United States District Court for the District of Arizona erred in finding as a fact (if such be its finding) that none of the Specifications of objections to the bankrupt's discharge have been sustained in that there was no substantial evidence or any evidence to sustain such finding, and that the uncontradicted evidence shows that each of said Specifications has been sustained.

XXI.

That the United States District Court for the District of Arizona erred in finding as a fact (if such be its finding) that there has been no fraud committed by the bankrupt, and that he is not guilty of false swearing or of any act which would bar his discharge in that there is no substantial evidence nor any evidence that would sustain such finding, and the uncontradicted evidence shows that the

bankrupt was guilty of false swearing and of acts which would bar his discharge.

XXII.

That the United States District Court for the District of Arizona erred in rendering judgment that each and all objections to the bankrupt's discharge are overruled upon the ground that there is no substantial evidence nor any evidence to sustain such judgment, nor any finding of fact upon which said judgment may be predicated, and that the uncontradicted evidence shows that each and all of said objections should be sustained.

XXIII.

That the United States District Court for the District of Arizona erred in granting the bankrupt's petition for discharge upon the ground that there is no substantial evidence nor any evidence to sustain such judgment granting such discharge nor any finding of fact upon which such judgment for discharge may be predicated. [775]

XXIV.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the First Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to

the bankrupt's discharge should have been sustained.

XXV.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Second Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXVI.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Third Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXVII.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Fourth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no [776] substantial evidence nor any evidence to sustain

such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXVIII.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Fifth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXIX.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Sixth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXX.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Seventh Specification of grounds of opposition to bankrupt's discharge was

not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained. [777]

XXXI.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Eighth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXXII.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Ninth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXXIII.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Tenth Specification of grounds

of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXXIV.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Eleventh Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no [778] substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXXV.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Twelfth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXXVI.

That the United States District Court for the District of Arizona erred in its finding (if such be

its finding) that the Thirteenth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXXVII.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Fourteenth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained. [779]

XXXVIII.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Fifteenth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XXXIX.

That the United States District Court for the

District of Arizona erred in its finding (if such be its finding) that the Sixteenth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XL.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Seventeenth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XLI.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Eighteenth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no [780] substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XLII.

That the United States District Court for the District of Arizona erred in its finding (if such be its finding) that the Nineteenth Specification of grounds of opposition to bankrupt's discharge was not sustained upon the ground that there was no substantial evidence nor any evidence to sustain such finding, and that the uncontradicted evidence shows that said Specification of grounds of opposition to the bankrupt's discharge should have been sustained.

XLIII.

That the United States District Court for the District of Arizona erred in sustaining an objection to the following question propounded by the objectors to Witness George Wilson, testifying as to the time of an indebtedness due by the bankrupt:

"Q. How long had that indebtedness been owing?"

the answer to which would have been that said indebtedness was owing ever since the year 1912.

The purpose of said question being to prove the insolvency of the bankrupt at the time of the acquisition of the property known as the Globe property. Exception to ruling was granted.

XLIV.

That the United States District Court for the District of Arizona erred in sustaining an objection to the question asked on cross-examination by objecting creditor of Thomas W. Nealon, who had

been called as a witness for the bankrupt, as follows:

"Q. Now in reference to the specification First (c) first state whether or not—" [781]

as being an improper limitation upon the right of cross-examination, exception to said ruling being granted.

XLV.

That the United States District Court for the District of Arizona erred in limiting the cross-examination of Thomas W. Nealon, called as a witness by the bankrupt, as to questions to be propounded concerning each of the other specifications of objections to the discharge of the bankrupt, the request for such examination made after the sustaining of the objection referred to in the last assignment of error being as follows:

Mr. DYER.—Your Honor, I wish to ask the same question as regards each specification.

The COURT.—That is the reason I sustained the objection. I anticipated that.

said objection being sustained upon the ground only that it was improper cross-examination. Exception was granted as to ruling on each specification.

WHEREFORE, the said trustee and the said objecting creditor (appellants) pray that said order and decree of the District Court of the United States for the District of Arizona be reversed, and that said District Court for the District of Arizona be ordered to enter an order and decree reversing

the order entered in said court in said cause granting said bankrupt a discharge.

THOMAS W. NEALON,
Trustee.

J. J. MACKAY,
By JOHN L. DYER,
ALICE M. BIRDSALL,
Attorneys for Objecting Creditor,
Appellants.

[Endorsed]: Filed Feb. 9, 1929. [782]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BOND.

Now, on this 9th day of February, 1929, comes Thomas W. Nealon, trustee in bankruptcy in the above-entitled matter, and J. J. Mackay, creditor in the above-entitled matter, and present to the Court their petition for allowance of an appeal intended to be urged by them and that proper transcript of record and proceedings and papers upon which order of Court of January 12, 1929, was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such order or other proceedings may be had as may be proper in the premises, and in consideration thereof,—

IT IS ORDERED that the appeal be and hereby is allowed in the above-entitled cause, as prayed for

in the petition as to said trustee, and as to said creditor upon his filing a bond for costs in the sum of Two Hundred Fifty Dollars ($250.00) to be approved by the Court.

WM. H. SAWTELLE,
District Judge.

[Endorsed]: Filed Feb. 9, 1929. [783]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Thomas W. Nealon, trustee, and J. J. Mackay, objecting creditor, as principals, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto the above-named George W. Shute, bankrupt, of Phoenix, Arizona, in the sum of Two Hundred and Fifty Dollars ($250.00) for the payment of which well and truly to be made we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of February, 1929.

WHEREAS, the above-named Thomas W. Nealon, trustee, and J. J. Mackay, objecting creditor, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Ap-

peals for the Ninth Circuit, to reverse the final judgment granting the said George W. Shute a discharge in the above-entitled proceeding entered in the office of the Clerk of the United States District Court for the District of Arizona, on the 12th day of January, 1929.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Thomas W. Nealon, trustee, and J. J. Mackay, objecting creditor, shall prosecute their appeal to [784] effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) THOMAS W. NEALON. (L. S.)
(Signed) J. J. MACKAY. (L. S.)
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By (Signed) D. E. GORTON,
Attorney-in-fact.

Attest: (Signed) F. E. SCRIVNER, (Seal)
Signed, sealed and delivered in the presence of:

Approved.
(Signed) WM. H. SAWTELLE,
U. S. District Judge.

[Endorsed]: Filed Feb. 9, 1929. [785]

[Title of Court and Cause.]

ORDER ENLARGING APPELLANT'S TIME TO AND INCLUDING AUGUST 5, 1929, FOR FILING RECORD AND DOCKETING CASE WITH CLERK OF U. S. CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

For good cause shown the application of appellants for enlargement of time in which to file the record and docket the case with the Clerk of the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, is hereby granted, and time for filing the record and docketing the case with the Clerk of the United States Circuit Court of Appeals, 9th Circuit, by said appellants, is hereby extended and enlarged up to and including the 5th day of August, 1929.

Done in open court this 28th day of February, 1929.

WM. H. SAWTELLE,
Judge United States District Court.

True copy.

[Endorsed]: Filed Feb. 28, 1929. [786]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of

the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above-entitled cause, and you shall include in said transcript the following pleadings, papers and proceedings on file, to wit:

1. Voluntary petition in bankruptcy.
2. Bankrupt's application for discharge.
3. Appearance of trustee in opposition to discharge.
4. Appearance of objecting creditor in opposition to discharge.
5. Orders extending time for filing specifications of grounds of opposition to discharge by trustee and objecting creditor.
6. Creditor's specification of grounds of opposition to discharge.
7. Trustee's specification of grounds of opposition to discharge.
8. Findings, judgment and order of Court. [787]
9. Order granting discharge.
10. Notice of appeal. (Minute Entry.)
11. Petition for appeal.
12. Assignments of error with acceptance of service.
13. Citation to appellee and return of service thereof.
14. Order allowing appeal and fixing bond.
15. Bond on appeal with approval thereof.
16. Statement of evidence.
17. Notice of lodging statement of evidence and praecipe.

18. Praecipe for transcript of record.

19. Order enlarging appellants' time for preparation of record and filing of praecipe, also time of appellee.

20. Order enlarging appellants' time for filing record and docketing case with Clerk of United States Circuit Court of Appeals, Ninth Circuit.

21. Application for order of transmittal of original exhibit.

22. Order for transmittal of original exhibit.

23. Trustee's and objecting creditor's original exhibit No. 31.

24. Order approving statement of evidence.

25. All minute entries made herein.

26. All other orders of court made herein.

27. Clerk's certificate to transcript of record. [788]

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 16th day of April, 1929.

THOMAS W. NEALON,
Trustee and Appellant.
JOHN L. DYER,
ALICE M. BIRDSALL,
Attorneys for Objecting Creditor and Appellant.

Received copy of the within praecipe this 16th day of April, 1929.

JAMES R. MOORE,
ORME LEWIS,
Attorneys for Bankrupt and Appellee.

[Endorsed]: Filed Apr. 16, 1929. [789]

In the District Court of the United States in and for the District of Arizona.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States, for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the matter of George W. Shute, Bankrupt, numbered B–486–Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 792, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $148.00, and that the said sum has been paid to me by counsel for Trustee and Objecting Creditor.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of said Court this 12th day of September, 1929.

[Seal] C. R. McFALL,
Clerk.
By J. Lee Baker,
J. LEE BAKER,
Chief Deputy Clerk. [790]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to George W. Shute, Bankrupt, GREETING:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, California, thirty (30) days from and after the day this citation bears date, pursuant to the appeal duly authorized and filed in the Clerk's office of the District Court of the United States for the District of Arizona, wherein Thomas W. Nealon, trustee, and J. J. Mackay, creditor, all of Phoenix, Arizona, are appellants, and George W. Shute is appellee, to show cause if any there be, why the order, rulings and decree in said appeal mentioned should not be

reversed and corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, United States Judge for the District of Arizona, on the 9 day of February, 1929.

[Seal] WM. H. SAWTELLE,
District Judge.

RETURN ON SERVICE OF WRIT.

United States of America,
——— District of Arizona,—ss.

I hereby certify and return that I served the annexed Citation on Appeal on the therein named George W. Shute, by James R. Moore, attorney at law, together with the following: Assignment in error; petition for appeal to Court of Appeals for order granting discharge of bankrupt; order allowing appeal and fixing bond and bond for appeal, by handing to and leaving a true and correct copy thereof with above-enumerated papers in same case, personally, at Phoenix, in said District, on the 11th day of February, A. D. 1929.

G. A. MAUK,
U. S. Marshal.
By J. W. McCormick,
Deputy.

[Endorsed]: Citation on Appeal. Filed Feb. 11, 1929. [791]

[Endorsed]: No. 5949. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Nealon, Trustee, and J. J. Mackay, Creditor, Appellants, vs. George W. Shute, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed September 17, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,

Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. NEALON, Trustee, and J. J. MACKAY, Creditor, *Appellants,* *vs.* GEORGE W. SHUTE, Bankrupt, *Appellee.*	**No. 5949.**

Appeal from the United States District Court for the District of Arizona.

REPLY BRIEF OF APPELLANTS.

THOMAS W. NEALON, *Trustee,*
ALICE M. BIRDSALL,
Attorneys for Appellants.

WILLIS N. BIRDSALL,
of Santa Fe, New Mexico,
on the Brief.

No. 5949.

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. NEALON, Trustee, and J. J. MACKAY, Creditor,

Appellants,

vs.

GEORGE W. SHUTE, Bankrupt,

Appellee.

Appeal from the United States District Court for the District of Arizona.

REPLY BRIEF OF APPELLANTS.

Counsel for appellee in stating the nature of the case, pages 2, 3 and 4 of their brief, have cited part of the record without including other parts needed to convey accurate information on the points covered, and while it is perhaps immaterial in any event, counsel for appellants deem it wise to present to the court such further citations as will make the matters referred to clear and thus avoid misapprehension as to the true facts.

On page 2 of appellee's brief appears what purports to be a stipulation entered into on January 3d appearing in Volume 1, page 109, of the transcript as follows:

> "That the court may have the transcript of testimony taken before the referee for review before hearing."

Counsel for appellee, however, omit to cite several other stipulations preceding the one cited and entered into at the same time, the first of which reads as follows:

> "That all depositions and testimony heretofore introduced in evidence before the referee may be admitted *in so far as pertinent.*" (Italics ours.)
>
> (Trans., Vol. 1, p. 109.)

It might appear from the statement of appellee that a stipulation had been entered into by counsel by which it was agreed that Judge Sawtelle should read and consider all testimony taken before the referee whether or not pertinent to the issues involved on the hearing on discharge. As will be seen by the record this is not a fact. A stipulation was merely made permitting Judge Sawtelle to take the referee's files in the case to Tucson for examination before the trial, such stipulation following the one made that on the hearing depositions and testimony before the referee, "so far as pertinent," might be admitted. We are unable to determine from the language of appellee whether it was intended to create the impression that the trial court reviewed and considered in reaching his conclusions matters appearing in the referee's files "not pertinent" to the issues on discharge, and not introduced in evidence, and that the entire record

considered by the trial court is not here, but clearly such inference is deducible from the language used by appellee, and is not in accord with the facts, which we deem should be made clear. Reference is made to the order approving the statement of evidence appearing in Volume 2, page 842, of the Transcript, wherein Judge Sawtelle certified that the statement of evidence with amendment attached contains "all of the testimony in the case." Certainly this court and all parties are bound by this certification by the trial judge, and the impression seemingly intended to be created by the language of the appellee that the entire record considered by the trial court is not before this court is dissipated. In view of this certification of Judge Sawtelle we are unable to determine why appellee inserted on page 3 of its brief,

> "The record does not show the names of the witnesses whose testimony was taken before the referee nor the nature of the exhibits attached to the transcript of their testimony; neither does the transcript show that it contains all of the testimony so reviewed by the judge before hearing."

Obviously, the record here would contain neither a list of witnesses whose testimony had been taken before the referee on other matters, nor a description of the exhibits which might be attached to evidence taken before the referee. This proceeding was an original hearing before the court on the matter of the discharge of the bankrupt and had

neither been referred nor had any evidence been taken in same prior to the ninth day of January, 1929, and no evidence was introduced except as it appears in this record. On the trial appellants produced certain witnesses who had testified before the referee, and in order to save the time of the court it was stipulated that their evidence before the referee should be admitted in this proceeding, and that they would be examined before the court only as to any new matters concerning which appellants desired testimony. This was true of the witnesses George F. Wilson, E. A. Wedepohl and Sylvan Ganz, all of whom were in court. (Trans., Vol. 1, pp. 111, 263, 233 and 243.) The same stipulation was made with respect to the testimony of Jessie M. Shute, wife of the bankrupt (Trans., Vol. 1, p. 132), and the testimony of A. E. England, who was under subpoena, but was unable to appear by reason of illness. (Trans., Vol. 1, p. 361.) Appellants on the trial attempted to offer in evidence certain testimony of the bankrupt given before the referee during various examinations as admissions against interest. The trial judge as shown by transcript, Volume 1, page 301, directed appellants to offer the document as a whole, stating that he would read it and pick out the admissions against interest and later, and at the conclusion of the cross-examination of the bankrupt, appellants offered *all* the testimony of the bankrupt given before the referee as a part of their case and the same was admitted. (Trans., Vol. 2, p. 676.) If any testimony of any witness taken before the referee

was "pertinent," counsel for appellee had the same opportunity to offer it in evidence as had the appellants to offer the parts they desired.

We are, therefore, at a loss to understand the following language on page 4 of appellee's brief:

> "In addition to original testimony taken before the court there were also introduced in evidence transcripts of all the testimony of Judge Shute and that of *some* of the other witnesses taken before the referee."

We sincerely trust it was not the intention of counsel for appellee to insinuate that the trial judge based his conclusions on matters outside the record after having certified that the record contained all the testimony considered by him.

Appellee, on page 10 of his brief, seeks to distinguish the case of Milkman vs. Arthe, 221 Fed. 134, on the ground that the question raised was not false swearing or opposition to discharge. The case, however, directly holds that the fact that a wife saved money from her household allowance or money handed to her by her husband did not make it her separate property. The case at bar is even stronger than the Milkman vs. Arthe case, *supra,* for in the case at bar the bankrupt testified that money from his earnings was placed in a joint account so either could check against it. Also see income tax return for 1927, in which a $1200 loss paid out of this savings account in February, 1928, is deducted as a separate loss of the bankrupt, thirty-two days before adjudication of bankruptcy. (Trans., Vol. 2, p. 804.)

The two Arizona cases on page 15 of appellee's brief holding that a conveyance of community property from one spouse to the other changes its character from community to separate property correctly state the law. In neither case, however, was the grantor insolvent.

The case of In re Crenshaw, 95 Fed. 632, quoted on page 15 of appellee's brief, merely holds that the transfer in that case having been made more than four months before the petition in bankruptcy is not declared null and void by the Bankruptcy Act.

In the case of In re Howell, 105 Fed. 504, cited by appellee on page 16 of his brief, the fact showed that the property involved (being $20,000 in cash) had been conveyed to the wife *nine years* before the bankruptcy, and that a creditor's bill had been filed several years before, which was still pending, for the recovery of this property. The Court held that under the facts, the property need not be scheduled. The community property law was not involved.

In the Morrow case, 97 Fed. 574, cited by appellee (page 17 of brief) on the question of fraudulent intent, the facts were stipulated that Nancy Morrow (the bankrupt) had never claimed nor *believed she had the right to claim* the property omitted from her schedules, since the partition of her father's estate, and on such stipulation as to her *belief,* the Court held there was no fraudulent intent on her part, even though she in fact had an interest in the property.

While it is true that in the Spiroplos case, cited by appellee on page 18 of his brief, this Court held that the trustee had not sustained the burden of establishing that the bankrupts had concealed property with fraudulent purpose, a perusal of that case shows no similarity between the actions of the bankrupts there and those of the bankrupt in the instant case. In fact the very language used there, namely, "Omissions to set forth the transactions complained of are more easily attributed to honest than dishonest purposes," distinguishes the whole matter from the issues here. If there is a single omission in the case at bar which points to an honest rather than a dishonest purpose, we have failed to perceive it. Every omission and concealment charged was in the interest of the bankrupt, and the sum of over $2,000 had already been brought into the estate which would have been lost had no investigation been made. It is noticeable that the bankrupt never "omitted" to claim an exception or a privilege in his own interests.

Appellee next cites the Carlson case, 18 Fed. 103, and quotes at length therefrom on pages 21 and 22 of his brief on the character of evidence necessary to sustain a finding of making a false oath. It will be recalled that in that case the Court stated that while not satisfied with the evidence, he could not find that the bankrupt had wilfully made a false oath or concealed property, citing the fact that the bankrupt was an ignorant person, who imperfectly understood English, and that it was extremely diffi-

cult in such circumstances for correct schedules to be made.

The case of Humphries vs. Nalley, 269 Fed. 607, is cited by appellee on page 22 of brief on the same matter of false oath. A reading of the case shows no slightest resemblance to the facts here. In that case the bankrupt was a laborer who omitted from his schedules $30 in money (which he used for his filing fees), a watch and household furniture valued at from $100 to $125, all of which were exempt. The Court held the omission not intentional, as he had signed the schedules prepared for him and testified fully and freely at the first meeting. Had the bankrupt in the instant case omitted to schedule only exempt property, this matter would undoubtedly not be pending here. That was property he remembered perfectly and he had no hesitation in scheduling it and claiming the exemption therefor.

Referring to the Weiner case, cited by appellee on page 24 of brief, on the matter of keeping books, the citation therefrom is correct so far as it goes. If intended to leave the impression, however, that a discharge was granted in that case, *that* is erroneous, for a discharge was there denied. We therefore supplement the quotation of appellee with this language, immediately following that quoted:

> "On the other hand, the election to keep them implies that they, if not by themselves, then in conjunction with other less formal records shall *prima facie* give every evidence of an hon-

> est effort to reflect the *entire business* of the bankrupt. As long as there is any doubt on this point, *a court of bankruptcy should resolve that doubt for the benefit of creditors.* A discharge is a privilege granted by the Act. One who seeks thereby to avoid his debts, *must comply strictly with its provisions.*" (Italics ours.")

The Merritt case, decided by this court, upheld the discretion of the trial court in refusing a discharge to a bankrupt whose fraud it seems to us was not nearly as flagrant as that of the bankrupt in the case at bar, and the case from the Eighth Circuit, Barton Bros. vs. Texas Produce Co., 136 Fed. 355, was in the same category. In both of those cases was stressed the absolute necessity of a full surrender of property and a frank disclosure of his affairs by the bankrupt before a discharge would be granted.

The statement of counsel for appellee on page 27 of appellee's brief that the Transcript does not contain all of the testimony read and considered by the trial court, as heretofore pointed out herein, is contrary to the facts and obviously misleading. We refer again to the certification of Judge Sawtelle appearing on page 842, Volume 2 of Transcript that the statement of evidence contains *all of the testimony in the case.* No stipulation was made or *intended* that Judge Sawtelle was to take the record of the referee to Tucson for any other purpose than to "review" same to familiarize himself with the proceedings had before the referee, and

it was clearly understood by the Court and *all parties* that all evidence considered on the hearing was introduced on the hearing. Judge Sawtelle's understanding is clearly indicated by his language on page 301, Volume 1 of the Transcript.

Referring to appellee's statements on page 18 of his brief, that the trustee testified (Vol. 2, p. 439 et seq., Trans.) that "notwithstanding he had been trustee for approximately a year and eight months he had never instituted any suits or taken any action in a court of competent jurisdiction to recover the numerous items of property which he claimed had been fraudulently conveyed, given away and knowingly and fraudulently concealed," we respectfully submit that an examination of the record will show that this statement of appellee is not in accordance with the facts and that the trustee did *not* so testify.

In the first place, the record shows that the trustee was elected at the first meeting of creditors on May 1, 1928 (Trans., Vol. 2, p. 698), and that therefore at the time of this hearing on January 9, 1929, only *eight* months had elapsed since his election instead of *a year and eight months,* as asserted by appellee. Furthermore it appears from the record that as to four items of property (the savings account and the Essex car being two, and the trustee not being permitted by Mr. Moore, counsel for appellee to finish his sentence and tell what the other two were (Trans., Vol. 2, p. 439), orders to show cause why turnover orders should not be made were then pending before the referee. It further ap-

pears (Trans., Vol. 2, pp. 441 and 262), that both the Creed and Noble notes were for the first time even seen by the trustee in court at this hearing, their production having theretofore been refused. The trustee further testified that he contemplated proceedings on both the Goswick and the Globe property the nature of which he refused to disclose (Trans., Vol. 2, pp. 457, 458), and it must be kept in mind that knowledge of the Goswick transaction first came to the trustee Thanksgiving week, only two or three weeks before the specifications of objection to discharge were filed; that it had been necessary to take the deposition of Mary E. Holmes in Boston in September, 1928, to obtain information regarding the mortgage on the Globe property *not* furnished by the bankrupt after request for it (Trans., Vol. 2, p. 798), and that bankrupt's wife had been examined regarding the Globe property and other property in order to obtain further necessary information late in November, 1928. (Trans., Vol. 1, p. 167.) It is also shown by the record that each and all of these examinations disclosed wide discrepancies in matters formerly testified to by the bankrupt and that the trustee was still conducting examinations at the time the specifications of objection to discharge were filed on December 19, 1928. It should be further borne in mind that the bankrupt had filed his petition for discharge on May 29, 1928, on the day when he first produced for the trustee *any* records, save a few checks, and those few and incomplete, and before the trustee had had opportunity to examine those records and question the

bankrupt concerning same, and before the examinations had been completed which resulted in the ascertainment of the true facts regarding the status of the Hudson car and the life insurance policy, and the recovery of those items for the bankrupt's estate.

The examination of the bankrupt was not concluded at the time the specifications of objection to discharge were filed on December 19th, but on December 27th, *eight days after* the filing of the specifications of objection to discharge, he for the first time gave testimony concerning certain transactions and produced an incomplete statement of his alleged financial transactions. (Trans., Vol. 2, p. 810 et seq.)

To hold that the fraudulent concealment of property could not be urged as a bar to a discharge unless and until suits to recover the property concealed or fraudulently transferred had been instituted would certainly be nullifying the provisions of the act, and such is not the holding of the courts. Obviously where, as is often the case, there are few if any assets in the bankrupt's estate, creditors need not advance money for costly litigation in order to place themselves in a position to assert the rights given them under the act itself of objecting to a discharge on the ground that property has been concealed from the estate. As was said by the Court of Appeals for the Sixth Circuit in Devorkin vs. Security Bank, etc., 243 Fed. 171:

> "In deciding whether the conveyance had the effect to hinder, delay and defraud creditors, it

> is of no controlling importance that the trustee had not been able to avoid it, or even that he had not tried to avoid it."

But apart from the misstatement of the facts and of the testimony of the trustee in the language quoted above from appellee's brief, and notwithstanding that the right to oppose discharge on the ground of fraudulent concealment in nowise depends upon the institution of actions to recover the property, the fact remains that the situation respecting the nine items on which appellee claims no actions for recovery had been instituted in "competent courts" at the time of this hearing was as follows: As to three of these items, namely, the Hudson car, the life insurance policy and the $250 La Prade deposit, they had all been recovered for the estate *without* litigation. As to two other items, the savings account and the Essex car, orders to show cause why turnover orders should not be made were then pending before the referee. As to the phonograph, the bankrupt had at one time promised to surrender that, without action being taken (Trans., Vol. 2, p. 788). And as to the other three items, the Globe property, the Goswick matter, and the $995 Wentworth payment, the trustee testified he had in mind the procedure he intended to follow. (Trans., Vol. 2, pp. 457, 458.) In addition to this two other orders to show cause why turnover orders should not be made were pending before the referee.

Just what the bankrupt considers a "court of competent jurisdiction" we are unable to determine. While *he* was the one who voluntarily in-

voked the jurisdiction of the Bankruptcy Court, to secure for himself release from his indebtedness, he seemingly resents the application of the provisions of the act requiring the surrender of his property and assets and a full and frank disclosure of his affairs as a condition precedent to discharge from his debts. His attitude from the time he adopted bankruptcy as, to use his own language, "the easiest way," has been not only indifferent, but scornful in meeting the obligations placed upon him by the provisions of the act. Since the magnificent gesture with which he filed his voluntary petition in bankruptcy, accompanied by schedules listing only one creditor with an indebtedness of over $31,000, and total nonexempt assets (not even listing his 25 per cent interest in the firm of which he was a member) of $15.67 cash and a lot at Globe valued by him at $250, against which were unpaid taxes of $45), (Trans., Vol. 1, pp. 199–202), he has cheerfully and voluntarily done only one thing in accordance with the provisions of the act—viz., to file his petition for discharge less than six weeks after his adjudication. Every other action taken and every disclosure made, resulting in the recovery for the estate at the time of this hearing of over $2,000, besides the 25 per cent interest in his law firm, were the result of orders of the Court or the persistent and painstaking efforts of the trustee, or both. He forced the trustee to consume months of time and conduct expensive examinations of many witnesses and records in order to obtain information as to property concerning which frank

disclosure should have been made by him in the first instance, and he now even assumes to dictate the manner in which the trustee shall proceed in recovering assets of the estate and to object because the latter has not commenced litigation in other courts to recover property, the very existence of some of which was unknown to the trustee until a short time before this hearing. Is it not a fair inference that this bankrupt all the way through was determined to make the recovery of any property so costly (with at the start only $15.67 available in the estate) that the creditor would be discouraged at the outset and no investigation would be made?

We know of neither rule of law nor dictate of equity which requires a trustee in bankruptcy, whose duties are plain and fixed by the act, and who is under the direct supervision of the referee, to consult the pleasure or wishes of the bankrupt as to the time, place or method of his procedure to recover concealed assets, and certainly ordinary prudence would suggest to a trustee the inadvisability of taking the bankrupt into his close confidence on matters pertaining to the recovery of such assets, where the concealment has been conceived and carried out by the bankrupt himself.

In the closing peroration in their brief, counsel for appellee seemingly advance the, to appellants, most remarkable inference that the trial judge had personal knowledge of the parties here (assuming that by the word "actors" was meant the parties and their counsel), which he considered in reaching his conclusions, rather than, or in addition to, the

record before him. Possibly we mistake the intentions of counsel for appellee, but we can gather no other meaning and we refer to it only to say that if such *was* their belief and their intention was to convey that belief, it should be urged rather as a reason for reversal of the trial court's decision than for sustaining it.

Appellants cannot see that knowledge—or belief of knowledge—since it is given to none to read the hearts and motives of others except as they are revealed by actions and deeds—of any or all of the parties concerned in litigation could ever be considered a safe criterion in guiding a trial court in reaching a decision, and we can hardly believe that counsel for appellee so meant to contend.

Appellants are willing that this court shall determine the "manner of men" (and women), who are what appellee terms "actors" in this proceeding from the cold facts shown by this record.

That record will disclose the objecting creditor as the man who in 1918 signed as surety the note of his then friend for $20,000, and as a result thereof suffered a financial loss in payment of the note and interest (no part ever being paid by the bankrupt) of over $31,000.00 (Trans., Vol. 1, pp. 179–190) and who finally and in 1927, unable to obtain any satisfaction, placed the matter in the hands of an attorney for collection. It discloses the attorney for that creditor in June, 1927, agreeing with the bankrupt to withhold suit until after October 1st, 1927, in consideration of a waiver of the statute of limitations which was running against the debt (Trans., Vol. 1,

p. 189), and who negotiated with the bankrupt over a period of several months in an endeavor to reach an amicable settlement of the indebtedness; who, in fact did not bring suit for the recovery of the amount due this creditor until April, 1928, and after the bankrupt had refused to make settlement of the entire indebtedness on a basis of payment of $6,000. (Trans., Vol. 2, p. 792.) It discloses the bankrupt as a man who, with a net income in excess of $18,000 for the year 1927, not only refused to settle this claim for $6,000 but refused to pay as much as $100 a month on same (Trans., Vol. 2, p. 746), who after securing the extension of time before suit would be filed in June, 1927, proceeded during the months intervening before bankruptcy to place earnings and property, as he believed, outside of the reach of this creditor; who put a conditional sales contract in November, 1927, on a car which was then completely paid for, because, as he says on his examination, he expected he would have trouble with this creditor (Trans., Vol. 2, p. 539), who testified at the examination before the referee he "had made up his mind he (Mackay), would never get a look-in" (Trans., Vol. 2, p. 791); who admitted on examination that he held a $6,000 dividend paid by his firm in June, 1927, out of his bank account and purchased cashier's checks to cover the amount because he was negotiating a settlement of an indebtedness in excess of $7,000 with the Old Dominion Bank of Globe for $2,200, and he feared he would lose his settlement if the bank knew of this payment (Trans., Vol. 2, p. 829); who under oath

on May 1st testified he owed about $1,000 on his Hudson car and that he had turned it back to England, the dealer (Trans., Vol. 2, pp. 710, 711), when in fact the car was entirely paid for, and who subsequently testified that he expected to get the car back and pay it out, "but not for someone else's benefit" (Trans., Vol. 2, p. 737); who admits making oath to income tax returns, schedules and an answer in a suit in which he was defendant involving real estate in Yavapai County, in all of which were statements he now says are untrue; who swore under examination in the referee's court that he had not received any amount but $500 from Goswick, when in fact he had received in the preceding eighteen months the sum of $3,500 from Goswick. This and numerous other statements in the record reveal the manner of man the bankrupt was and is. The record discloses the trustee as a man who by persistent effort at the time of this hearing had succeeded in already bringing into the estate over $2,000 and a 25 per cent interest in the law firm, none of which had been scheduled and which would have been lost save for his efforts; who because he remained true to his oath and had the temerity to insist that this bankrupt, like *any other person* who invokes this act, must surrender *all* his property and make full and frank disclosure of his affairs, became the object of an attack by bankrupt and his counsel in an endeavor to camouflage the issues and divert attention from the conduct of the bankrupt.

The bankrupt admits the weakness of his own position when instead of pointing out anything in

the record to sustain that position, he attempts by innuendo to attack the good faith of the trustee.

We can readily understand why the activities of the trustee which had forced him to disgorge more than $2,000 at the time of this hearing are particularly obnoxious to the bankrupt, but we submit that all the camouflage in the world cannot obliterate the fraudulent record of the bankrupt himself nor can baseless accusations of others relieve the solemn obligation laid upon him by the Bankruptcy Act.

We believe that the uncontradicted testimony in the record, and the admissions of the bankrupt on his various examinations, leave but one inference to be drawn from the facts thereby established, and that is that the bankrupt knowingly and fraudulently concealed from the Court, the creditor and the trustee, assets belonging to his estate and in pursuance of his scheme to defraud this creditor, he knowingly and fraudulently made false oaths to his schedules and gave false testimony on his examination.

Respectfully submitted;

THOMAS W. NEALON,
Trustee,
ALICE M. BIRDSALL,
WILLIS N. BIRDSALL,
Of Counsel,
Attorneys for Appellants.

No. 5953

United States
Circuit Court of Appeals
For the Ninth Circuit.

TOSHIKO INABA,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, San Francisco, California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5953

United States
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TOSHIKO INABA,

Appellant,

vs.

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Appellee.

Transcript of Record.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:

ALBERT H. ELLIOT, Esq., and GUY C. CALDEN, Esq., Flatiron Bldg., San Francisco, Calif.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Calif.

In the United States District Court, Southern Division, Northern District, California.

No. 19,919–L.

TOSHIKO INABA,

Petitioner and Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration,

Respondent and Appellee.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare transcript on appeal in the above-entitled case to be composed of the following papers, to wit:

1. Amended petition for writ of habeas corpus.
2. Order to show cause.

3. Minute order dated March 25th, 1929.
4. Minute order dated May 10th, 1929.
5. Notice of filing of excerpts of testimony from the original Immigration Record.
6. Respondent's memorandum of excerpts of testimony from the original Immigration Record.
7. Petition for appeal.
8. Order allowing petition for appeal.
9. Assignment of errors.
10. Cost bond on appeal.

ALBERT H. ELLIOT,
GUY C. CALDEN,
Attorneys for Petitioner and Appellant.

Filed August 30, 1929. [1*]

In the United States District Court, Southern Division, Northern District, California.

No. 19,919–L.

TOSHIKO INABA,

Petitioner,

vs.

JOHN D. NAGLE, Commissioner of Immigration,

Respondent.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable District Court of the United States, in and for the Southern Division, Northern District, California:

The petition of Toshiko Inaba respectfully shows:

I.

That petitioner is imprisoned and restrained of her liberty, and is being held in detention at the United States Immigration Station, at Angel Island, California, and is in the custody of the Hon. John D. Nagle, Commissioner of Immigration.

II.

That your petitioner was born in the town of Walnut Grove, County of Sacramento, State of California, on the 11th day of October, 1908, and is a citizen of the United States and of the State of California.

III.

That petitioner alleges the following facts and circumstances:

That upon the 13th day of December, 1911, petitioner, who was then a minor of the age of three (3) years, went to Japan and lived in the household of her uncle, Juzo Inaba, and that upon said date the father and mother of petitioner, to wit, Hikotaro Inaba and Kazume Inaba, did not accompany petitioner to Japan, but remained in the State of Cali-

fornia and ever [2] since have remained therein and are now residents of and domiciled therein.

That thereafter and on the 15th day of June, 1927, petitioner, without her own knowledge and contrary to and without the consent of her parents, the said Hikotaro Inaba and Kazume Inaba, was married to Tirao Yamamoto, who was a citizen of the Empire of Japan and not a citizen of the United States. That petitioner was married to the said Torao Yamamoto under the laws of Japan, but that under the said laws of Japan the said marriage was void and of no avail because the said Hikotaro Inaba and Kazume Inaba, the parents of petitioner, did not consent in writing, or otherwise thereto.

That petitioner did not cohabit with said Torao Yamamoto, but continued to live with the people of the household of her said uncle and as a member of his family.

That petitioner within four (4) months after the said marriage, and immediately after she had gained knowledge of said marriage, promptly objected thereto and on the 22d day of September, 1927, caused her family record to be changed so that she would not thereby be a member of the family of the said Torao Yamamoto, but would be a member of her own family, and that said acts of petitioner constitute, under Japanese law existing at the time, a complete and absolute separation of the said alleged marriage between petitioner and the said Torao Yamamoto.

That at all of the times herein mentioned petitioner was a minor.

That on or about the 19th day of August, 1928, petitioner migrated from the Empire of Japan to the Port of San Francico in the State of California, United States of America, arriving in said Port of San Francisco on September 3d, 1928; that petitioner was not possessed of a passport or *ny* visa endorsed thereon but applied to the said Hon. John D. Nagle, Commissioner of Immigration, for admission to [3] the United States as a citizen thereof and presented to the Board of Special Inquiry at San Francisco evidence of the fact that she was born in California and was a citizen of the State of California, and of the United States.

That after hearing by the said Board of Special Inquiry, the said Board found that petitioner was born in the United States as alleged herein, that petitioner was of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration Laws, and that she had lost her American citizenship by marriage to a person not a citizen of the United States and not eligible to citizenship therein.

That thereafter and on the 17th day of September, 1928, the said Board of Special Inquiry rendered its decision in words following, to wit:

> "This Board has unanimously voted to deny your admission to the United States, on the ground that you are a person of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration Laws, you having lost your American citizenship by marriage to an Oriental. This decision is not final, you have the right to appeal to the Secretary of La-

bor at Washington, D. C. If you are deported, it will be at the expense of the steamship company bringing you here, which must furnish you with quarters equal to those occupied by you on the vessel by which you came. Do you wish to appeal? (Yes.)''

That the said decision is based upon the ground that petitioner is of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration Laws.

That thereafter, upon rehearing, the said Board of Special Inquiry again found that petitioner was born in the United States as alleged herein, that she was of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration Laws, and that she had lost her American [4] citizenship by marriage to a person not a citizen of the United States and not eligible to citizenship therein.

That thereafter and on the 5th day of November, 1928, the said Board of Special Inquiry rendered its decision in words following, to wit:

''This Board has unanimously voted to deny your admission into the United States on the ground that you are a person of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration Laws, you having lost your American citizenship by marriage to an Oriental. This decision is not final; you have the right to appeal to the Secretary of Labor at Washington, D. C.

"If you are deported, it will be at the expense of the steamship company bringing you here, which must furnish you with quarters equal to those occupied by you on the vessel by which you came.

"Do you wish to appeal? (Yes.)"

That thereafter and after proceedings duly had, made and given, petitioner took an appeal from the said decision of the said Board of Special Inquiry to the Secretary of Labor, at Washington, D. C., in accordance with the statutes in those cases made and provided.

That thereafter, and on the 28th day of January, 1929, the Board of Review at Washington, D. C., dismissed said appeal on the ground that the said petitioner is a person of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration Laws, she having expatriated herself by her alleged marriage with Torao Yamamoto.

That said decision of the Board of Review is in words and figures, as follows:

"55642/657—San Francisco.

January 28th, 1929.

In Re: Toshiko Inaba.

No.

This case comes before the Board of Review as a request for permanent admission. [5]

Presiding: Messrs. Winings, Finucane, Zimmerman.

Heard: Attorney Roger O'Donnel.

This record relates to a twenty-year old female, a citizen of the United States, Japanese race, who arrived at the Port of San Francisco, on September 3d, 1928, in the United States from birth until three years of age and coming with the intention of remaining permanently. No immigration visa of any kind.

Excluded: Of a race ineligible to citizenship.

The applicant was born in this country and is, therefore, born a citizen. She was taken *aboard* when a small child. A Japanese marriage ceremony was entered into with a Japanese subject. Subsequently the applicant was registered in her family record.

Question was raised as to whether or not the registration was tantamount to an annulment or merely termination of the marriage which was conceded to be lawful. It is established by the record that the applicant was lawfully married to a subject of Japan and subsequent to such lawful marriage, it was terminated.

This question is more fully discussed in the opinion of the Solicitor of January 21st, 1929. The question was also presented whether being born in this country and having lost citizenship by marriage to an alien ineligible to citizenship, which at the time of the application for admission was nonexistent, the alien was ineligible to citizenship.

In the opinion above referred to, it was held that this alien is ineligible to citizenship and therefore, as she is an applicant for permanent residence,

exclusion is required. It is recommended that the excluding decision be affirmed.

L. PAUL WINING,
Chairman, Secy. and Comr.,
Gen'l Board of Review.

T. G. F./CbP. So ordered:

W. U. AUSTEN,
Assistant Secretary. [6]

That the said decisions of the said Board of Special Inquiry and of the said Secretary of Labor are erroneous in law and that said officials have misconstrued the expatriation laws of the United States.

That the said petitioner is not imprisoned or restrained by virtue of any formal order or process or decree of any court. That the said imprisonment and detention of petitioner are illegal and without authority for the following reasons:

(a) That said petitioner is a citizen of the United States and has committed no act of expatriation;

(b) That the said Hon. John D. Nagle, Commissioner of Immigration, has no authority in law or jurisdiction to issue any warrant for the removal and deportation to Japan of petitioner as there is no proof before the said Commissioner of Immigration to show or justify the conclusion that petitioner is not a citizen of the United States, but, on the other hand, that the evidence as herein alleged amply shows that the alleged marriage of petitioner and the said Torao Yamamoto was no marriage at all under the laws of Japan or under the laws of the State of California or of the United States.

WHEREFORE your petitioner prays that a writ of habeas corpus issue herein, and that after due hearing thereon, a writ may be issued discharging petitioner from the custody of the said Hon. John D. Nagle, Commissioner of Immigration, and that an order to show cause be issued forthwith ordering that the said Hon. John D. Nagle, Commissioner of Immigration, be and appear before this Court on the —— day of ————, 1929, at the hour of —— o'clock A. M. of said day at the courtroom of said court, at the Post Office Building, San Francisco, California, to show cause, if any he has, why a writ of habeas corpus should not be issued as herein prayed, and that a copy of this petition and said order be served upon the said Hon. John D. Nagle, Commissioner of Immigration, and upon the United States Attorney in said Northern District of [7] California, Southern Division, and that the said Hon. John D. Nagle, Commissioner of Immigration, or whoever acting under his orders shall have the custody of the said petitioner, be and he is hereby ordered and directed to release petitioner from the custody of the said Hon. John D. Nagle, Commissioner of Immigration, temporarily pending the hearing of this petition upon the petitioner giving a proper bond in such cases made and provided in the sum of $————.

TOSHIKO INABA,
Petitioner.

ALBERT H. ELLIOT,
GUY C. CALDEN,
Attorneys for Petitioner. [8]

United States of America,
Northern District of California,—ss.

Albert H. Elliot deposes and says: That he is one of the attorneys for the petitioner named in the foregoing petition, that the said petitioner is restrained of her liberty and in the custody of Hon. John D. Nagle, Commissioner of Immigration, at Angel Island, California, and for that reason that he makes this affidavit; that the said petition is true of his own knowledge except as to the matters therein stated on his information and belief, and as to such matters he believes it to be true.

ALBERT H. ELLIOT.

Subscribed and sworn this 11th day of March, 1929.

EVELYN LaFARGUE,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires Oct. 17th, 1931.

Filed March 11, 1929.

Service of the within amended petition and receipt of a copy is hereby admitted this 11th day of March, 1929.

GEORGE J. HATFIELD. [9]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the petition of Toshiko Inaba filed herewith,—

IT IS HEREBY ORDERED that Hon. John D. Nagle, Commissioner of Immigration, be and appear before this court on Saturday, the 9th day of February, 1929, at the hour of 10 o'clock A. M. of said day at the courtroom of said court, Post Office Building, San Francisco, California, to show cause, if any he has, why a writ of habeas corpus should not issue herein.

IT IS FURTHER ORDERED that a copy of this order and said petition be served upon said Hon. John D. Nagle, Commissioner of Immigration, and upon the United States Attorney in the said Northern District of California.

IT IS FURTHER ORDERED that said Hon. John D. Nagle, Commissioner of Immigration, or whoever acting under his orders shall have the custody of the petitioner, Toshiko Inaba, be and he is hereby ordered and directed to produce the said petitioner at the time herein specified and to hold said petitioner within the jurisdiction of this court.

Done in open court this 7th day of February, 1929.

HAROLD LOUDERBACK,
Judge.

Filed February 7, 1929. [10]

[Title of Court and Cause.]

NOTICE RE FILING OF EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

To the Petitioner in the Above-entitled Matter, and to Albert H. Elliot and Guy C. Calden, Her Attorneys:

PLEASE TAKE NOTICE that the respondent in the above-entitled matter will upon the hearing on the order to show cause rely upon certain excerpts of testimony from the original immigration record additional to the portions of such record which are set out in the petition for writ of habeas corpus herein, a copy of such additional excerpts being annexed hereto. Please examine same prior to the hearing on the order to show cause.

Dated:

GEORGE J. HATFIELD,
United States Attorney,
(Attorney for Respondent).
Per WILLIAM A. O'BRIEN.

Filed March 25, 1929.

Service of the within ——— by copy admitted the 21st day of February, 1929.

ALBERT H. ELLIOT and
GUY C. CALDEN,
Attorneys for Petitioner. [11]

[Title of Court and Cause.]

RESPONDENT'S MEMORANDUM OF EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

The witnesses herein are:

TOSHIKO INABA, aged 20, female, born Walnut Grove, California; in Japan from 1911 to September 3d, 1928.

AKIRA INABA; aged 18; male; born in the United States; in Japan from 1911 to September 3d, 1928; brother of the aforesaid applicant Toshiko Inaba.

HIKOTARU INABA; aged 52; male; born in Japan; first came to United States in 1902; went back to Japan in August, 1926, and returned to United States in November, 1926; father of the above-named applicant Toshiko Inaba.

The fact question in dispute is whether there was a lawful marriage entered into in Japan in October, 1927, between the applicant, Toshiko Inaba, and Tirao Yamamoto, a native and citizen of Japan, and an alien ineligible to citizenship in the United States.

We quote below excerpts of testimony before the Board of Special Inquiry, such excerpts being quoted from the original Immigration Record, on the basis of which the Board of Special Inquiry, and the Secretary of Labor reached their finding of fact that such a legal marriage had occurred.

I.

Legality of the Marriage Under the Laws of Japan.

Testimony of Applicant, Toshiko Inaba: [12]

"Q. Have you ever been married?

A. Yes, I have.

Q. When, where, and to whom were you married?

A. To Yamoto, Torao, in Japan, the year before last, in October."

(Immigration Record 55642/657—p. 3.)

* * * * * * * * * * *

"By the CHAIRMAN, to the INTERPRETER.—What does this record disclose as to the marriage and annulment of marriage of Toshiko Inaba?

By the INTERPRETER.—It shows her to have been registered into the family of Yamamoto Tatorao, Sho*wa* 2 (1927) June 15th, as his wife, and on the 22d day of September, of the same year, she was registered back into her own family.

Q. Does this record show shether or not the marriage union was dissolved?

A. Yes, by being registered back into her own family.

Q. Between the time of your registration into the family of Yamamoto and the time of your re-registration into your own family, were you considered to be the lawful wife of Yamamoto Tatorao?

A. I did not like the arrangement so I stayed at my own home; according to rules I showed my face at my husband's home, once, but that is all.

* * * * * * * * * * *

Q. Your registration into Yamamoto's family made you, in the eyes of the Japanese law, and of the Japanese people, the legal wife of Yamamoto Tatorao, did it not?

A. Yes, they all knew I was registered as his wife.

(Id., p. 9.)

Testimony of HIKOTARU INABA.

"Q. Has your daughter Toshiko been married?

A. Yes.

Q. When, where and to whom was she married?

A. 1926, in October, to Yamamoto, Torao."

(Id., p. 6.)

"Q. You testified on board the 'Taiyo Maru' in behalf of your daughter Tishiko, that she had been married and divorced, did you not? A. Yes.

Q. How was she married?

A. My brother-in-law, my wife's brother, who had charge of the children, in Japan, induced my daughter to be registered into my older brother's family, as the wife of Yamamoto, Tatorao; she did not wish to be married [13] but my brother-in-law overruled her objections. I do not know when they registered the girl as I was in the United States, and I also cannot say when the registration *as* annuled.

Q. Was your daughter's registration, as Yamamoto's wife made without your knowledge or consent?

A. I did not know about the proposal, as my brother-in-law spoke to me about it and as I was

greatly obligated to him for taking care of my children. I said, 'Do whatever you please'; and I left it in his hands. This matter was brought before me when I was on a visit to Japan.

Q. Was your formal consent essential to the registration of your daughter as Yamamoto's wife?

A. In a way, yes, because (changes) No. My brother was responsible for everything; I left everything in his care.

Q. Is your daughter, Toshiko, in the eyes of the Japanese law and of the Japanese people, considered the lawful wife of Yamamoto Tatorao?

A. Yes, according to registry, but I received a letter that she would not go to Yamamoto's house."

(Id., pp. 10, 11.)

Testimony of AKIRA INABA:

"Q. Has your sister Toshiko ever been married?

A. Yes, she was at the age of 18. She never lived with her husband as his wife. They were cousins and my relatives thought it best to cancel her marriage, so that was done soon after the ceremony.

Q. Did your sister live with her husband for about one month?

A. Maybe one or two months."

(Id., p. 5.)

There is also quoted below a certificate under seal of the Consulate General of Japan, dated October 15th, 1928, which was in evidence before the board:

"To Whom It May Concern:

This is to certify that the Family Record of Toshiko Inaba shows that her registration was concelled from that of her Family Record under date of June 15, 1927, upon her marriage to Torao Yamamoto. [14]

It further shows that she was re-registered into her father's family Record on September 22, 1927.

(In accordance with Japanese law, a marriage takes place when the official Registrar is notified. Therefore the registration of Toshiko Inaba into the family of Hanzo Yamamoto constituted a legal marriage with Torao Yamamoto.

This re-registration was the result of 'mutual consent' and necessitates the consent of the persons who possess the right to consent to the marriage. The result of this re-registration was to take the name of Toshiko Inaba from her husband's Family Record and re-register it in the Family Record of her father. After re-registration the wife resumes her maiden name. The act of re-registration in this case is not a judicial decree.

(Signed) K. SEKI,
Consulate General of Japan.

(Id., pp. 32, 33.) (Seal)."

II.

WHETHER RE-REGISTRATION OF APPLICANT CONSTITUTES A COMPLETE nullification of the marriage, or merely a dissolution of same.

There was in evidence before the Board of Spe-

cial Inquiry the following letter from the Consul General of Japan:

"CONSUL GENERAL OF JAPAN,
22 Battery Street,
San Francisco, California.

Hon. Edward L. Haff,
Acting Commissioner of Immigration,
U. S. Department of Labor,
Angel Island Station,
San Francisco, California.

Dear Sir:

Please refer to your letter of October 24, 1928, file No. 27184/23–10, pertaining to annulment of marriage in Japan, in which you quote

'What constitutes an annulment of marriage in Japan?'

In answer to the foregoing, we beg to advise you that a marriage may be annulled in most cases under the Japanese law for the following causes: [15]

1. A marriage of a person who is not legally of age;
2. A bigamous marriage;
3. A marriage before the lapse of a legally fixed period of time after the dissolution or annulment of a former marriage;
4. A marriage between the parties to an adultery;
5. A marriage between relatives who are legally prohibited from marrying;

6. A marriage between an adopted child, his or spouse, his or her lineal descendants or their spouses on the one hand, and the adoptive parents or their lineal ascendants on the other;
7. A marriage contracted without consent of those persons whose consent is necessary to the marriage;
8. A mariage owing to fraud or coercion;
9. And in case of the adoption of a man as a son each party to the marriage may apply to a court and demand annulment on the ground of invalidity or annulment of the adoption.

Answering your second question.

If a marriage is annulled, it is re-registered in the Family Record exactly the same as though it had been a divorce.

In other words, it makes no difference whether the marriage had been annulled, or divorced by mutual consent, or otherwise, the fact is properly entered in the Family Record of both the husband and of the wife.

An annulment under the Japanese law must be predicated upon the grounds hereinabove set forth as reasons for annulling a marriage and has no retroactive effect.

Divorce is not in the nature of a nullification of the original proceeding, but is entirely different and does not impair the legality of the marriage or original proceeding.

Trusting that the above explanation may simplify matters for you, I am

Respectfully,

UNICHI IDE,

Consul General of Japan."

(Id., p. 40, 41.)

Applicant Toshiko Inaba testified as follows:

"Q. In answer to the two questions quoted to you, the Counsel General under date of October 27th outlines causes for which marriages in Japan may be annuled and states that annulment under the Japanese law must be predicated upon the ground set forth in his letter as reasons for annulling the marriage. Were you legally of age when you were married? [16]

A. I do not know what legally the age is—but I think it is sixteen and I was over that age when I married.

Q. Were either you or Torao Yamamoto married to another when you married him?

A. No, he had been married so I had been told. No doubt he was divorced. I am not familiar with the details as he was in another Ken.

Q. Do you know that he had previously been married?

A. I was told he was married—that's all. Someone in the family told me,—I can't remember who.

Q. Was he a divorced man or a widower?

A. Divorced.

Q. How shortly after his divorce were you registered as his wife?

A. I should think it must have been a year from what I heard.

Q. You previously stated that you and Torao Yamamoto are first cousins, did you not?

A. Yes, he is the son of my father's brother.

Q. May first cousins be legally married in Japan?

A. I understand they may.

Q. Were you coerced into marrying Mr. Yamamoto?

A. I do not know whether you would call it 'coerced' but to me it was as they had made all arrangements. They simply went ahead and told me I must go through with it; according to Japanese way of thinking I had no alternative and no voice in the matter.

Q. Did you voice any objection to marrying him?

A. Yes, I did; I told him 'No.' One of my objections was that I had not finished school and also that I had not seen him since we were children.

Q. What was said to your objections?

A. They simply said, 'You will have to go through with it.' The uncle in charge of my affairs said that. I refer to my mother's brother, Inaba.

Q. Have you any statement to make?

A. I wish to explain that my mother's brother, Inaba, had taken care of us and stood as my father since I went to Japan so he made the arrangements for this marriage without consulting me according to the Japanese custom. After I was notified that I was to be the wife of my cousin Torao Yamamoto I objected and kept objecting until they

canceled the registration and re-registered me into the Inaba family."

(Id., p. 43.) [17]

GEORGE J. HATFIELD,
United States Attorney.
Per WILLIAM A. O'BRIEN.

Service of the within —— by copy admitted this 21st day of February, 1929.

ALBERT H. ELLIOT and
GUY C. CALDEN,
Attorneys for Petitioner.

Filed March 25, 1929. [18]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 25th day of March, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 25, 1929—ORDER SUBMITTING CAUSE ON BRIEFS, ETC.

After argument, ordered that the order to show cause as to issuance of writ of habeas corpus herein be and the same is hereby submitted on briefs to be filed in 5, 5 and 3 days. Further ordered that peti-

tioner's motion for leave to be admitted to bail be and same is hereby denied. [19]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 10th day of May, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 10, 1929—ORDER SUBMITTING CAUSE.

On motion of R. L. Frick, Esq., ordered that the order to show cause as to issuance of writ of habeas corpus herein be and the same is hereby submitted. [20]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 22d day of August, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—AUGUST 22, 1929—ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS.

It is ordered that the petition for writ of habeas corpus heretofore submitted herein be and the same is hereby denied and the petition for writ dismissed. [21]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes Toshiko Inaba, the petitioner and appellant herein, and says:

That on the 22d day of August, 1929, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus as prayed for, on file herein, in which said order in the above-entitled case certain errors were made to the prejudice of the petitioner and appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this petitioner and appellant prays that an appeal may be granted in her behalf to the Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may

be sent and transmitted to the said Circuit Court of Appeals; and further, that the said detained be held within the jurisdiction of this Court during the pendency of the appeal herein so that she may be produced in execution of whatever judgment may be finally entered herein.

Dated: San Francisco, California, August 26th, 1929.

ALBERT H. ELLIOT,
GUY C. CALDEN,
Attorneys for Petitioner and Appellant.

Filed Aug. 30, 1929. [22]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Toshiko Inaba, the petitioner and appellant herein, by her attorneys, in connection with the petition for an appeal herein, assigns the following errors which she avers occurred upon the hearing of the above-entitled case and upon which she will rely upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

I.

That the Court erred in denying the petition for a writ of habeas corpus herein and remanding the petitioner and appellant to the Immigration authorities for deportation.

II.

That the Court erred in holding that it had no ju-

risdiction to issue a writ of habeas corpus as prayed for in the petition herein.

III.

That the Court erred in holding that the allegations of the petition were not sufficient to justify the issuance of the order to show cause, as prayed for in said petition and in remanding the petitioner and appellant to the Immigration authorities for deportation.

IV.

That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein [23] were insufficient in law to justify the discharge of the petitioner from custody as prayed for in said petition.

V.

That the Court erred in holding that the decisions of the Board of Special Inquiry and of the Secretary of Labor are not erroneous in law and that the said officials have not misconstrued the expatriation laws of the United States.

VI.

That the Court erred in not holding that the imprisonment and detention of petitioner and appellant are illegal and without authority for the reason set forth in appellant's amended petition for writ of habeas corpus, to wit:

First, that the said petitioner is a citizen of the

United States and has committed no act of expatriation; and

Second, that the said Hon. John D. Nagle, Commissioner of Immigration, has no authority in law, or jurisdiction to issue any warrant for the removal and deportation to Japan of petitioner, as there is no proof before the said Commissioner of Immigration to show or justify the conclusion that petitioner is not a citizen of the United States, but on the other hand, that the evidence, as herein alleged, amply shows that the alleged marriage of petitioner and of said Torao Yamamoto was no marriage at all under the laws of Japan or under the laws of the State of California or of the United States.

VII.

That the Court erred in holding that petitioner and appellant is of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration laws, and that she had lost her American citizenship by marriage to a person not a citizen of the United States and not eligible to citizenship therein.

VIII.

That the judgment made and entered herein was and is contrary to law. [24]

IX.

That the judgment made and entered herein is not supported by the evidence.

X.

That the judgment made and entered herein was

and is contrary to the sworn allegations of the petition for a writ of habeas corpus.

XI.

That the judgment made and entered herein is contrary to the evidence.

WHEREFORE, the petitioner and appellant prays that the judgment and order of the Southern Division of the United States District Court for the Northern District of California, Southern Division, made and entered herein on the 22d day of August, 1929, denying the petition for a writ of habeas corpus, and refusing an order to show cause why the writ of habeas corpus should not issue on the allegations of said petition, and remanding the petitioner and detained to the Immigration authorities for deportation, be reversed, and that this cause be remitted to the lower court with instructions to issue a writ of habeas corpus as prayed for in said petition.

Dated: San Francisco, California, August 26th, 1929.

ALBERT H. ELLIOT,
GUY C. CALDEN,
Attorneys for Appellant and Petitioner.

Filed Aug. 30, 1929. [25]

[Title of Court and Cause.]

ORDER ALLOWING PETITION FOR APPEAL.

On this 30th day of August, 1929, comes Toshiko Inaba, the detained, by her attorneys, and having previously filed herein, did present to this Court, her petition praying for the allowance of an appeal to the Circuit Court of Appeals for the Ninth Circuit, intending to be urged and prosecuted by her, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the Circuit Court of Appeals, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court allows the appeal hereby prayed for and orders execution and remand stayed pending the hearing of the said case in the said Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that the respondent herein retain the said detained within the jurisdiction of this Court, and that she be not deported or permitted to depart from the jurisdiction of this Court, but remain and abide by whatever judgment may be finally rendered herein.

Dated at San Francisco, California, August 30th, 1929.

HAROLD LOUDERBACK,
United States District Judge.

Filed Aug. 30, 1929. [26]

BOND FOR COSTS ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Toshiko Inaba, as principal, and United States Casualty Company, as surety, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to the said United States of America, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of August, in the year of our Lord one thousand nine hundred and twenty-nine.

WHEREAS, lately at a District Court of the United States for the Northern District of California, in a suit depending in said court, between Toshiko Inaba, Petitioner and Appellant, vs. John D. Nagle, Commissioner of Immigration, Respondent and Appellee, a judgment was rendered against the said Toshiko Inaba, and the said Toshiko Inaba having obtained from said Court an order to reverse the judgment in the aforesaid suit, and a citation directed to the said Toshiko Inaba citing

and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

Now, the condition of the above obligation is such, that if the said Toshiko Inaba shall prosecute to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "Express Agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

UNITED STATES CASUALTY COMPANY.

By J. H. DRISCOLL,
Its Attorney-in-Fact.

Acknowledged before me the day and year first above written.

———————————. [27]

State of California,
County of San Francisco,—ss.

On this 25th day of August, 1929, in the year one thousand nine hundred and twenty-nine, before me, Thomas A. Dougherty, a notary public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared J. H. Driscoll, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of United States Casualty Company, and acknowl-

edged to me that he subscribed the name of Toshiko Inaba thereto as principal and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the City and County of San Francisco the day and year in this certificate first above written.

THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California.

Filed Aug. 30, 1929. [28]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 28 pages, numbered from 1 to 28, inclusive, contain a full, true and correct transcript of the records and proceedings, in the matter of Toshiko Inaba, on Habeas Corpus, No. 19,919, as the same now remain on file of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of eleven dollars and seventy-five cents ($11.75), and that the same has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of September, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [29]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to JOHN D. NAGLE, Commissioner of Immigration, San Francisco, California, and United States Attorney for Northern District of California, San Francisco, California, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Toshiko Inaba is appellant and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and

why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Northern District of California, Southern Division, this 30th day of August, A. D. 1929.

HAROLD LOUDERBACK,
United States District Judge.

Service of the within citation on appeal and receipt of a copy is hereby admitted this 30 day of August, 1929.

GEO. J. HATFIELD.

Filed Aug. 30, 1929. [30]

[Endorsed]: No. 5953. United States Circuit Court of Appeals for the Ninth Circuit. Toshiko Inaba, Appellant, vs. John D. Nagle, Commissioner of Immigration, San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 19, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,
Deputy Clerk.

No. 5953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOSHIKO INABA,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, San Francisco, California,

Appellee.

APPELLANT'S OPENING BRIEF.

ALBERT H. ELLIOT,
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544 Market Street, San Francisco,
Of Counsel.

Subject Index

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No. 5953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOSHIKO INABA,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, San Francisco, California,
Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from the order and judgment of the United States District Court in the Southern Division for the Northern District of California, denying the Petition for Writ of Habeas Corpus filed herein by petitioner and dismissing the Petition for Writ.

STATEMENT OF THE CASE.

Petitioner, a minor female citizen of the State of California and of the United States, went to Japan in the year 1911 and remained there until June 15th, 1927, at which time she went through some form of alleged marriage to Torao Yamamoto, a citizen of the Empire of Japan. At the time petitioner left the State

of California and went to Japan she was not accompanied by her parents, but they remained in the State of California and ever since have remained therein and are now residents of and domiciled therein. The consent of the parents to the alleged marriage was never given.

Petitioner never lived with her alleged husband, and within four months after the alleged marriage and immediately after she had gained knowledge of said alleged marriage, she promptly objected thereto and on the 22nd day of September, 1927, caused her family record to be changed so that she would not thereby be a member of the family of the said Torao Yamamoto, but would be a member of her own family.

Petitioner and her brother arrived at the Port of San Francisco, September 3rd, 1928. The brother was admitted and admission is denied petitioner. The ground of denial of admission to petitioner is that she has lost her American citizenship by expatriation because of her alleged marriage, and because she is of a race ineligible to citizenship.

We shall attempt to show in this argument that in denying the Petition for Writ of Habeas Corpus and dismissing the Petition for Writ, the Court erred in the particulars indicated by appellant's assignment of errors, appearing at page 26, et seq., of the Transcript of Record filed herein, as follows:

That the Court erred in denying the Petition for a Writ of Habeas Corpus herein and remanding petitioner and appellant to the Immigration authorities for deportation.

That the Court erred in holding that it had no jurisdiction to issue a Writ of Habeas Corpus as prayed for in the Petition herein.

That the Court erred in holding that the allegations of the Petition were not sufficient to justify the issuance of the Order to Show Cause, as prayed for in said Petition, and in remanding petitioner and appellant to the Immigration authorities for deportation.

That the Court erred in holding that the allegations contained in the Petition for a Writ of Habeas Corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of petitioner from custody as prayed for in said Petition.

That the Court erred in holding that the decisions of the Board of Special Inquiry and of the Secretary of Labor are not erroneous in law and that the said officials have not misconstrued the expatriation laws of the United States.

That the Court erred in not holding that the imprisonment and detention of petitioner and appellant are illegal and without authority for the reasons set forth in appellant's Amended Petition for Writ of Habeas Corpus, to-wit:

First, that said petitioner is a citizen of the United States and has committed no act of expatriation; and

Second, that the said John D. Nagle, Commissioner of Immigration, has no authority in law, or jurisdiction, to issue any warrant for the removal and deportation to Japan of petitioner, as there is no proof before the said Commissioner of Immigration to show

or justify the conclusion that petitioner is not a citizen of the United States, but on the other hand, that the evidence, as herein alleged, amply shows that the alleged marriage of petitioner and of said Torao Yamamoto was no marriage at all under the laws of Japan or under the laws of the State of California or of the United States.

That the Court erred in holding that petitioner and appellant is of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration laws, and that she had lost her American citizenship by marriage to a person not a citizen of the United States and not eligible to citizenship therein.

That the judgment made and entered herein was and is contrary to law.

That the judgment made and entered herein is not supported by the evidence.

That the judgment made and entered herein was and is contrary to the sworn allegations of the Petition for a Writ of Habeas Corpus.

That the judgment made and entered herein is contrary to the evidence.

ARGUMENT.

The alleged marriage must be tested either under the laws of the State of California or under the laws of the Empire of Japan. It will be our contention that whether tested under the laws of the one jurisdiction or the other, the decision of this Court must be in favor of petitioner.

If the alleged marriage is to be tested under the laws of the State of California, it is either void or voidable under Section 82 of the Civil Code, for the reason that petitioner did not consent to the alleged marriage because,

(a) Her consent was obtained by fraud; and

(b) Her consent was obtained by force and coercion.

If the alleged marriage is to be tested under the laws of Japan, it is either void or voidable, under Article 772 of the Annotated Civil Code of Japan, because the consent of the parents was not obtained; and also, under Article 783 of said Code for the reason that petitioner did not consent to said alleged marriage because,

(a) The alleged consent was obtained by means of fraud; and

(b) That the alleged consent was obtained by means of coercion.

If the alleged marriage was void and an absolute nullity, there was, of course, no marriage at all. If voidable, it has been either absolutely annulled, ab initio, by the acts and conduct of petitioner, or at the very least such acts and conduct of petitioner constitute a divorce.

If there was no marriage at all, there was, of course, no loss of citizenship.

If we admit the marriage but concede that it has been annulled by the acts and conduct of petitioner and as disclosed by the record of this case, there is, of course, no loss of citizenship. If there has been a

divorce, petitioner has the absolute right to regain her citizenship and to be admitted to the United States for this purpose as a matter of right, and under the authority of the *Yoshiko Hoshino* case, cited infra.

THE ALLEGED MARRIAGE WAS VOID—AN ABSOLUTE NULLITY.

It is our contention that the alleged marriage was absolutely void and a nullity. This is alleged in petitioner's Amended Petition and is in no way controverted by the Record. We submit that an examination of Respondent's Memorandum of Excerpts of Testimony from the original Immigration Record on pages 14 to 23 inc., conclusively shows that the alleged marriage is void for the reasons above set forth.

On page 16, Hikotaru Inaba, the father of petitioner, testified before the Board of Special Inquiry, in part, as follows:

> "My brother-in-law, my wife's brother, who had charge of the children in Japan, *induced* my daughter to be registered into my older brother's family, as the wife of Yamamoto, Torao; *she did not wish to be married,* but my brother-in-law overruled her objection; I do not know when they registered the girl as I was in the United States, and I also cannot say when the registration as (was) annulled." (Italics here and elsewhere in this brief ours.)

On page 21, petitioner's testimony in part is as follows:

> "I do not know what legally the age is, but I think it is 16 and I was over that age when I married."

(This testimony clearly shows an entire lack of knowledge of the law by petitioner as the age of consent under Japanese law is 25.)

In response to the question as to whether either petitioner or Torao Yamamoto were married to another at the time of petitioner's alleged marriage, she testified, as follows:

> "No, he had married, so I had been told, no doubt he was divorced. I am not familiar with the details, as he was in another ken."
>
> "Q. Do you know that he had previously been married?
>
> A. I was told he was married—that is, someone in the family told me, I cannot remember who."

And on page 22 of the said Transcript appears this illuminating testimony:

> "Q. Were you coerced into marrying Mr. Yamamoto?
>
> A. I do not know whether you would call it 'coerced' but to me it was as they had made all arrangements. They simply went ahead and told me *I must go through with it;* according to the Japanese way of thinking, I had no alternative *and no voice in the matter.*
>
> Q. Did you voice any objection to marrying him?
>
> A. *Yes I did. I told him, no.* One of my objections was that I had not finished school and also that I had not seen him since we were children.
>
> Q. What was said to your objections?
>
> A. They simply said, *'You will have to go through with it.'* The uncle in charge of my affairs said that. I refer to my mother's brother, Inaba.
>
> Q. Have you any statement to make?

A. I wish to explain that my mother's brother, Inaba, had taken care of us and stood as my father since I went to Japan so he made the arrangements for this marriage without consulting me according to the Japanese custom. *After I was notified that I was to be the wife of my cousin Torao Yamamoto I objected and kept objecting until they canceled the registration and re-registered me into the Inaba family.*"

We will not burden your Honors by referring to the effect of fraud, force and coercion in connection with an alleged marriage under the laws of California but shall point out the law of Japan in this regard.

Article 785 of the Annotated Civil Code of Japan, supra, reads, as follows:

> "A person who has been induced to contract a marriage owing to fraud or coercion may apply to a court for its annulment."

And quoting from what is called the "Explanation" to Article 785:

> "Such person had no intention to get married, —that is, to say, he or she was not married in accordance with his or her true intention and may, therefore, properly annul the marriage."

Section 772 of the Annotated Civil Code of Japan, reads in part, as follows:

> "In order to get married a child must first obtain the consent of the father and mother belonging to the same house. This does not apply, however, when a man has attained full thirty years and a woman full twenty-five years * * *."

Under the testimony just quoted, and the law, it is difficult for us to see how any doubt can exist as to the fact that the alleged marriage of petitioner was

an absolute nullity. Under California law it is perfectly clear that she did not consent to the alleged marriage because of fraud and force (coercion), and under the law of Japan it is equally evident that petitioner's consent was never given because of fraud and coercion, and in addition to this that the alleged marriage was a nullity for the reason that the consent of petitioner's parents was never obtained as required by the law of Japan. It will be noted in this connection that under Article 772 of the Annotated Civil Code of Japan, supra, it is necessary that the consent of *both* the father and mother be secured where the woman is under 25 years of age. The only evidence disclosed by the record, as to consent of the parents, is found on the bottom of page 16 of the Transcript of Record, and the top of page 17, where the testimony of petitioner's father reads as follows:

> "A. I did not know about the proposal, as my brother-in-law spoke to me about it and as I was greatly obligated to him for taking care of my children. I said, 'Do whatever you please'; and I left it in his hands. This matter was brought before me when I was on a visit to Japan."

For some reason unknown to us respondent seems to place great reliance upon this one bit of scanty testimony on the question of the consent of the parents to the alleged marriage, because he has underscored this testimony in its entirety. We are unable to see the importance of it for the reasons: that it is entirely too vague to amount to the consent of the father, and does not show whether the alleged consent was given before or after the alleged marriage, and still leaves undisputed the fact that the

consent of the mother was also necessary, and that is nowhere in the record shown to have been given.

We submit that all other portions of the testimony which are set forth in respondent's Memorandum of Excerpts of Testimony are merely conclusions of witnesses, in one instance even the conclusion of the interpreter as to whether or not the alleged marriage union was dissolved is given.

IF THERE WAS A MARRIAGE, IT IS VOIDABLE AND HAS BEEN ANNULLED AB INITIO BY ACTS AND CONDUCT OF PETITIONER AS DISCLOSED BY THE RECORD.

On page 15 of Respondent's Memorandum of Excerpts of Testimony, it is shown that petitioner on the 22nd day of September, 1927, was registered back into her own family. On the same page is also found the following testimony given by petitioner before the Board of Special Inquiry:

> "Q. Between the time of your registration into the family of Yamamoto and the time of your re-registration into your own family, were you considered to be the lawful wife of Torao Yamamoto?
>
> A. *I did not like the arrangement so I stayed in my own home; according to rules I showed my face at my husband's home, once, but that is all.*"

On page 17 of the record, petitioner's brother Akira testified as follows:

> "Q. Has your sister Toshiko, ever been married?
>
> A. She was at the age of 18, she never lived with her husband as his wife. They were cousins and my relatives thought it best to cancel her

marriage, *so that was done soon after the ceremony.*

Q. Did your sister live with her husband for about one month?

A. Maybe one or two months."

On page 22 of the record, petitioner testified in part, as follows:

> "After I was notified that I was to be the wife of my cousin, Torao Yamamoto. I objected and kept objecting and they cancelled the registration and re-registered me into the Inaba family."

On page 17 of the record, petitioner's father testified that he had received a letter, advising him that his daughter would not go to Yamamoto's house.

It is our contention that even if petitioner was married to Yamamoto, said marriage was almost immediately annulled as disclosed by the record.

As between the allegations of the petition and the testimony contained in the excerpts relied upon by respondent himself, we have nothing but conclusions of the witnesses for the respondents, while for the petitioner the testimony conclusively shows that there was no marriage, or even if we concede that there was one, that there was a subsequent annulment.

The only testimony which might seem in any way to favor respondent is that of the brother, Akira Inaba, as to the portion which we have quoted above, wherein he does testify in answer to the question as to whether petitioner lived with her husband, "maybe one or two months." We submit to your Honors that the witness was obviously confused in this answer and feel that we are justified, within the bounds of

reason, in suggesting that what the witness had reference to was the period of time between the alleged marriage and the termination thereof. When he was asked, the question, "Has your sister, Toshiko Inaba, ever been married?", his answer was that she had been at the age of eighteen, and then he volunteered the statement, "she never lived with her husband as his wife." There clearly would have been no reason for the witness to have changed his testimony in this regard and the leading question put to the witness clearly confused him.

In any event we have the testimony of the petitioner herself to the effect that she never lived with her husband, the testimony of the father of petitioner that she never lived with him and the original testimony of the brother to the same effect.

EVEN IF WE CONCEDE THERE HAS BEEN A MARRIAGE AND NO ANNULMENT, THERE HAS AT THE VERY LEAST BEEN A DIVORCE OR TERMINATION OF THE MARRIAGE, AND PETITIONER HAS THE RIGHT TO RE-ENTER THE UNITED STATES FOR THE PURPOSE OF REGAINING HER CITIZENSHIP.

Even were there no specific authorities to sustain our contention we would challenge anyone to dispute the proposition that this minor girl, *not an alien,* but a native of the State of California, has the absolute right under the circumstances of this case to come back to her native land and regain her citizenship. It would be anomalous and unthinkable that it could be said of this native-born girl that she, who by virtue of her birth in the United States is entitled to the full protection of all the laws thereof, and who enjoys

the most valued possession known to mankind, American citizenship, should now, because of this alleged marriage, find herself a "woman without a country."

It is axiomatic in the law that where one is given a legal right all incidental means necessary to the enjoyment of that right follow as a matter of course.

Fortunately we are not without specific authority to sustain our position. The case of *Yoshiko Hoshino* (decided by the United States District Court for the Territory of Hawaii, November 22nd, 1927, No. 1466) which has not yet reached the law books, by the strongest analogy, unequivocally gives the petitioner here the right to enter the United States for the purpose of regaining (if lost) her citizenship.

In this case, the petitioner was a Japanese woman who was born in Hawaii and had lived there all her life. She had lost her American citizenship by marriage to a Japanese alien, and the marriage relation having terminated she applied to the District Court of the Territory of Hawaii for naturalization. The Court took the view (to use the language of the learned counsel on the other side in their brief filed in the lower Court):

> "That the ratio limitation upon naturalization, which restricts that privilege to 'aliens being free white persons' and to aliens of African nativity and the persons of African descent, should not be considered applicable to persons who had once been American citizens by reason of birth, and hence, that the petitioner was eligible to citizenship and might be naturalized."

This is our exact point. We contend that it was never the intention of Congress to place in the same

classification foreign-born aliens and native-born persons who had lost their citizenship merely by marriages to aliens, and not in the manner in which we generally understand the term "expatriation," to-wit: an actual renunciation of allegiance to the United States by becoming naturalized in a foreign country.

To use the language of the learned Judge:

> "In my opinion the application of the petitioner does not come within either the spirit or the letter of section 2169 R. S., which applies almost exclusively to persons of alien birth; and it includes within its scope both men and women. It has no application to a special proceeding such as the one now before the court. In this connection, with the provision of section 2169 R. S. in mind, it is pertinent to observe that the Act of 1922, respecting the question now under consideration, deals, not with alien men and women, nor with women in general, but only with women of American birth, who, irrespective of their race, are or have been married to aliens. Obviously, the Act in this regard is special.
>
> As I view this matter, Congress, by the Act of 1922, intended to provide a new and special method in lieu of section 3 of the Act of March 2, 1907, whereby all American born women, irrespective of their race, who had lost their citizenship by marriage to aliens prior to September 22, 1922, could resume their citizenship by naturalization immediately, that is to say, during the marriage, with the exception of these who had married aliens ineligible to citizenship, and as to these, likewise irrespective of their race, they may resume their citizenship by naturalization after the 'termination of the marital status.' That such was the purpose of the Act of 1922, to my mind, is clear. This view, in my opinion, is fair and equitable, and accords with reason and jus-

tice. *I cannot believe that Congress intended by this Act to deprive an American born woman of her right to resume her American citizenship under the circumstances of this case and thereby place upon her the stigma of being a woman without a country.* Thus viewing the matter my conclusion is, that the petitioner Yoshiko Hoshino, is eligible to citizenship. The usual oath may be administered upon her appearance in open Court."

A CASE INVOLVING UNITED STATES CITIZENSHIP IS SUI GENERIS AND THE GOVERNMENT ITSELF IN A VERY ABLE BRIEF IN THE SO-CALLED ALIEN EXCLUSION CASES CONCEDES THIS TO BE TRUE.

It is admitted in the case at bar that the petitioner was a citizen of the United States and we quote from the brief of the learned United States Attorney only for the purpose of showing that not only is petitioner entitled to a judicial determination of her case as a citizen of the United States, regardless of the findings of the Immigration Board, but that great care should be taken that the rights of American citizenship shall not be taken from her except upon evidence that is clear and conclusive.

The learned United States Attorney says, quoting from page 47 of the brief referred to:

> "In other words, a natural-born citizen is, before temporarily leaving the land of his birth, a member of our population and under the protection of our national Bill of Rights, and his return works, in contemplation of law, a resumption of that protection.
>
> *These cases, therefore, of natural-born citizens distinguish sharply and strongly from the cases*

now before this Court, and stand upon their own ground."

On page 48 of his brief, he quotes from a decided case, as follows:

> "As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts." (*Chin Yow v. U. S.,* 208 U. S., at 12.)
>
> *"It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."* (*Kwock Jan Fat,* 253 U. S. at 464.)"

And then in his own language he says:

> "That terrification of the Judiciary arising from the contemplation of Banishment of a Natural-Born Citizen by executive decision, then, led the Court to lay down the rule in Chin Yow's case, that, when a miscroscopical examination of the executive record revealed to the kindly judicial eye some circumstance to which the judicial finger could point as a departure from the mode of procedure prescribed for the executive to follow, which departure rendered the executive decisions void (the mode being the measure of the power), then, because the executive decision was void, a habeas corpus jurisdiction arose, and, jurisdiction having attached would be retained for the whole case, including a hearing of the merits *de novo.* As said in Chin Yow (208 U. S. at 13):
>
> 'The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before a judge.'
>
> So, in the subsequent natural-born-citizen case of Kwock Jan Fat, the Court said (253 U. S., at 465):

> 'The practice indicated in Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits.' "

All that we are contending for this petitioner, a native-born citizen of the United States, is that the validity of her marriage should be rigidly inquired into when the question of her citizenship is at stake. We can conceive of no more valuable right which a minor citizen of the United States can have than that of American citizenship and to take it away upon any trivial, unsatisfactory or frivolous ground is to make American citizenship something as lightly passed over as other requirements which an alien must have to enter this country.

WE HAVE ALLEGED IN OUR PETITION THAT THE DECISIONS OF THE BOARD OF SPECIAL INQUIRY AND OF THE SECRETARY OF LABOR ARE ERRONEOUS IN LAW AND THAT SAID OFFICIALS HAVE MISCONSTRUED THE EXPATRIATION LAWS OF THE UNITED STATES.

Respondent, in the lower Court, contended that the findings of the Immigration Department are conclusive and could not be disturbed by any Court. With this contention we cannot agree.

The case of

> *Ex Parte Hing* (decided January 19th, 1927), 22 Fed. (2d) 554,

is absolutely conclusive on the point for which we are contending, that is, that the Court may, in a so-called "citizenship case," which we insist is sui generis, fully

and exhaustively go into the testimony as disclosed by the record, and may determine for itself whether or not there was in fact a marriage. The Court uses this language:

> "The marriage ceremony of China, as well as the Mohammedan ceremony, may be very primitive. This court may not take judicial notice of foreign laws or customs; the court must apply local laws and customs to any controverted fact in the absence of proof. *United States citizenship is a very substantial right.* It is the highest political privilege which an individual may enjoy. * * *
>
> If the applicant is *legally* married to an alien ineligible to citizenship, she has expatriated herself, and may not be admitted. Ex parte (Ng) Fung Sing, supra. The fact that some ceremony was performed does not show legal marriage, and *the belief of the applicant and her alleged husband of the marriage status would not of itself establish the relation.* Ex parte Morel (D. C.) 292 F. 423. Nor would the fact that the applicant sought a divorce and obtained an interlocutory decree establish marriage, if, in fact, such relation had not been consummated. A marriage in China, consummated by a Mohammedan ceremony, not in harmony with the Chinese law or custom of marriage, would have no more operative effect than a marriage, consummated in California, pursuant to a ceremony of French custom in the republic of France. See Ex parte Morel, supra. *There is no competent evidence before the court* to show that the applicant has been legally married, or that there has been consummated a relation which binds the applicant to her alleged husband, upon which she could predicate a claim for support, or inheritable right of a surviving spouse in the event of death.
>
> The writ will therefore be granted, returnable on the 21st day of March, 1927, with the provision that, pending return, the Immigration Depart-

ment grant a rehearing *for the production of further testimony* with relation to the marriage and that such testimony, together with the findings of the Board of Special Inquiry, be transmitted to the Secretary of Labor as on appeal, and the final additional record be incorporated in the return of the Commissioner of Immigration to this writ. On failure to comply with the provision herein, on or before the return day herein, or such further time to which the return may be extended by the court, the writ will be granted and the petitioner discharged. The petitioner will be released on filing a bond, or recognizance, with the usual conditions, in the sum of $500.00, pending this hearing."

On further hearing on this case it was held that the marriage of the petitioner was not arranged by the parents, but by the parties; that there was no investigation of the respective histories of the families in duplicate for three generations made, nor was such record exchanged between the parties or the families, nor ancestral and family worship and pledge observed; and that no matrimonial letters or cards were exchanged, nor were any of the requirements of Chinese custom observed; that in effect the bride and groom eloped and some ceremony was performed by a Mohammedan priest. It is to be noted that there was no termination of the marriage in the *Hing* case.

We submit that this case squarely negatives the contention of counsel that a finding of the executive branch of the Government is conclusive, but does unequivocally hold that in just such a case as the case at bar the Court may go fully into the facts and is not bound by the findings of the Immigration Department.

On this same point, that is, the question as to whether a finding of fact by an executive branch of the Government is conclusive or whether the Court may inquire into the testimony and the facts, we wish to cite the case of

Kaoru Yamataya v. Thos. M. Fisher, etc., 23 Sup. Ct. Rep. 611 (decided April 6th, 1903).

In this case a Japanese woman landed at the Port of Seattle and was denied admission on the ground that she was a pauper and a person likely to become a public charge. We wish to call the Court's attention to the fact that this woman was excluded from this country by the Act of March 3rd, 1891, which Act excluded aliens of certain classes.

The Court uses this language:

> "The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude *aliens* of a particular race from the United States; prescribe the terms and conditions upon which certain classes of *aliens* may come to this country; establish regulations for sending out of the country such *aliens* as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention,—are principles firmly established by the decisions of this court. Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. Ed. 1146, 12 Sup. Ct. Rep. 336. * * *"

Quoting from *Nishimura Ekiu v. United States,* supra, the Court says:

> "The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having

the general management of foreign relations, or to the Department of the Treasury charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of *foreigners,* and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority.

After observing that Congress, if it saw fit, could authorize the courts to investigate and ascertain the facts on which depended the right of the *alien* to land, this court proceeded: 'But on the other hand, the final determination of *these* facts may be intrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. * * * It is not within the province of the judiciary to order that *foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law,* shall be permitted to enter, in opposition to the constitutional and *lawful* measures of the legislative and executive branches of the national government. *As to such persons,* the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. * * *'''

And again, quoting from *Lem Moon Sing v. U. S.* (158 U. S. 538), the Court uses this language:

"The power of Congress to exclude *aliens* altogether from the United States, or to prescribe the terms and conditions upon which they may

> come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. And in Fok Yung Yo's case, the latest one in this court, it was said: 'Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country'."

And later on the Court says:

> "* * * Now, it has been settled that the power to exclude or expel *aliens* belongs to the political department of the government and that the order of an executive officer invested with the power to determine finally the facts upon which an *alien's* right to enter this country, or remain in it, depended, was 'due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.' "

We submit that clearly the Court, in the *Yamataya* case, supra, sharply differentiated between the rights of *aliens* and those of others, and made such discrimination advisedly and intentionally and with the obvious purpose of holding, by implication, that *where petitioner, in a case of this kind, is a native-born citizen (and in our case a minor) of the United States, and not an alien, who it is contended by the Government has forfeited her citizenship, the burden is upon the Government to show that she has so forfeited her citizenship, and the courts can and will inquire fully and exhaustively into the facts of the case to see if this native-born (minor) citizen, entitled to all the protection of our laws and the Fifth Amendment to*

the United States Constitution, has in fact expatriated herself.

Surely it will not be urged by the Government that the petitioner in this case is an alien in the ordinary sense of the word, because an alien is one who is foreign-born, and petitioner is a native of the State of California, and we contend that she, as such native-born girl of the State of California, is on an entirely different footing from an alien, that is: a foreign-born person; and we further contend that this precise distinction is clearly made by the Court in the *Yamataya* case, supra, as well as in the Hawaiian case, cited infra.

We also wish to cite, on this branch of the argument:

Chin Shue Teung v. Tillinghast, etc., 33 Fed. (2d) 122, Decided May 31st, 1929;

Wong Tsick Wye, et al. v. Nagle, etc., 33 Fed. (2d) 226, Decided June 24th, 1929;

Young Bark Yau v. United States, 33 Fed. (2d) 236, Decided June 17th, 1929;

Weedin, etc. v. Jew Shuck Kwong, 33 Fed. (2d) 287, Decided June 24th, 1929;

Tillinghast, etc. v. Wong Wing, 33 Fed (2d) 290, Decided October 30th, 1928;

Terzian v. Tillinghast, etc., 33 Fed. (2d) 803, Decided June 20th, 1929;

Chin Gim Sing, et al. v. Tillinghast, etc., 31 Fed. (2d) 763, Decided April 3rd, 1929;

Hom Moon Ong v. Nagle, etc., 32 Fed (2d) 470, Decided April 29th, 1929;

Go Lun v. Nagle, etc., 22 Fed. (2d) 246, Decided October 24th, 1927.

In the last cited case, by way of showing how far the Courts will go in inquiring into the testimony in cases of this character, we quote as follows:

> "A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious and without any support in the testimony."

We wish also to cite the case of

Moy Fong v. Tillinghast, Commissioner, 33 Fed. (2d) 125, Decided June 12th, 1929,

and to call your Honors' attention to the fact that this case, like the case at bar, is a citizenship case, and it will be noted that the Court comments upon this fact and goes into the evidence adduced before the Immigration Commissioner and finds that the applicant did not have a fair hearing.

If it be contended by respondent that the only time the Courts may go into the testimony and evidence is where the question of an unfair hearing is at issue, then our answer is that in the case at bar, where the finding of the Immigration Department is so palpably unsupported by the testimony of the witnesses, such a hearing is, from the utter irreconcilability of the finding with the testimony, tantamount to an unfair hearing.

EVEN IF WE CONCEDE, ARGUENDO, THAT THE COURTS MAY NOT DISTURB THE FINDINGS OF FACT OF THE IMMIGRATION DEPARTMENT, THEY MAY UNQUESTIONABLY INQUIRE AS TO WHETHER THE IMMIGRATION DEPARTMENT HAS MISCONSTRUED THE LAW OR LAWS IN QUESTION.

The Immigration Department of our Government, arbitrary as it oftentimes is, *cannot misconstrue the laws of the United States.* In other words the Courts may always inquire to see if the evidence supports the conclusion of law. If any authority upon this proposition is needed, we have it in the case of

United States, ex rel. Singleton v. Tod, Commissioner of Immigration, 290 Fed. 78, Decided May 7th, 1923.

We find the learned Court quoting from the United States Supreme Court decision in the case of

Ng Fung Ho v. White, 42 Sup. Ct. 492.

"* * * But where there is jurisdiction, a finding of fact by the Executive Department is conclusive (U. S. v. Ju Toy, 198 U. S. 253); and Courts have no power to interfere *unless there was either denial of a fair hearing* (Chin Yow v. U. S. 208 U. S. 8) *or the finding was not supported by the evidence* (American School v. McAnnulty, 187 U. S. 94), *or there was an application of an erroneous rule of law* (Gegiow v. Uhl, 239 U. S. 3). To deport one who so claims to be a citizen obviously deprived him of liberty, as was pointed out in Chin Yow v. United States, 208 U. S. 8, 13. It may result, also, in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guaranty of due process of law. The difference in security of judicial over administrative action has been adverted to by this court"—

citing U. S. v. Woo Jan, 245 U. S. 552, 38 Sup. Ct. 207, 62 L. Ed. 466.

As a matter of fact the rule quoted brings the case at bar under all three of the exceptions to the rule that the Courts will not interfere with a finding of the Executive Department;—that is to say except where *there has been a denial of a fair hearing, or the finding was not supported by the evidence, or that there was the application of an erroneous rule of law.*

We have alleged such application of an erroneous rule of law in our petition and we submit that this Honorable Court under the authority just referred to, may go exhaustively and fully into the facts to ascertain whether the Board of Special Inquiry and the Secretary of Labor have misconstrued the expatriation laws of the United States.

THERE IS A VITAL DISTINCTION BETWEEN EXPATRIATION ACCOMPLISHED BY AN ACTUAL RENUNCIATION OF ALLEGIANCE BY BECOMING A NATURALIZED CITIZEN OF ANOTHER COUNTRY, AND THAT BROUGHT ABOUT BY THE MARRIAGE OF AN AMERICAN-BORN WOMAN TO AN ALIEN INELIGIBLE TO CITIZENSHIP.

It is our contention that it was never intended that an American-born woman who expatriates herself by marriage to an alien should be considered in the same class with such a woman who actually renounces her allegiance to the United States by becoming a naturalized citizen of another country. We have nowhere been able to find a case holding that where an American-born woman has so lost her citi-

zenship she may not regain it again, but must thenceforth be without a country.

Surely the Government will not seriously contend that there is any analogy between the case of an American-born woman voluntarily renouncing her allegiance to the United States and becoming by her own intentional act, a citizen of another country, and the case of an American-born woman who is alleged to have married an alien ineligible to citizenship, and then, because of a subsequent divorce,—finding herself with no citizenship at all, but in the very terrible situation of being a "woman without a country."

In one case a voluntary exchange of American citizenship for citizenship in another country is made by the woman, and in the other case a complete bereavement of citizenship is effected, not through the intentional, voluntary act of the woman, but only as an incident to the principal object sought to be accomplished, that is to say, the marriage.

In the case of renunciation by naturalization in another country, the act itself causes the loss of citizenship, whereas in the case of marriage to the alien, the act itself is consummated for the purpose of bringing about the marriage of the parties, and as a mere incident thereto it causes the loss of the citizenship. In the one case the loss of citizenship is irrevocable and in the other case the citizenship is lost subject to the right to regain it upon termination of the marriage.

SUMMARY.

We have then the picture of a native-born minor citizen of the United States, leaving her native land and going through some sort of alleged (we may almost say, mock) marriage to a Japanese alien. The Board of Special Inquiry was so much in doubt (and well it might be) as to whether this girl had been married at all, that the hearing was reopened once and adjourned on several occasions for the purpose of endeavoring to decide just what this petitioner did in fact do.

The testimony is conclusive that petitioner was married without the consent of her parents and that she was coerced into the marriage, that she never lived with her alleged husband; that she objected to the marriage as soon as she learned of it; continued to object, and in fact, still continues so to object; and that she promptly caused her name to be re-registered back into her own family.

The immigration authorities relied upon opinions which amounted to pure conclusions of law and in some cases, as shown by the record, even accepted an opinion in the nature of a conclusion of law from the interpreter who was present at the hearing.

The record conclusively shows that a lay opinion by way of letter from the Consul General of Japan, not under oath, seems to have been the final determining factor in persuading the Immigration Department to take from this American-born woman her citizenship.

CONCLUSION.

We contend for this petitioner, a native-born minor citizen of the United States, that the validity of her alleged marriage, should, and in fact, under the law must, be rigidly inquired into when the sacred right of American citizenship is at stake. We are confident that your Honors will find that there was never any marriage at all between the parties, but that if there was one, it was promptly annulled.

If, however, your Honors are satisfied that there was a marriage which has not been annulled, then there was at least a divorce, because this was the finding of the Immigration Department itself. Therefore, this petitioner under the right which is given her by virtue of her United States nativity and the Fifth Amendment to the Constitution of the United States, and the right which is specifically given her under the authority of the *Hoshino* case, supra, may be admitted into the United States to regain that most valued and sacred of all possessions, her United States citizenship. While there is any doubt at all as to the citizenship of one claiming it, that doubt should be resolved in favor of the claimant.

We have made a most thorough and exhaustive study of this case because we consider it to be one of vital importance not only to the petitioner herself but to every American-born woman or girl, because, potentially, every American-born woman or girl could become a victim of the grievous error made by the Immigration Department in taking from this petitioner her citizenship.

In all our study and research, we have found no language so appropriate to use in closing this brief as that found in the case of *Kwock Jan Fat v. White,* 40 Sup. Ct. 566, supra, and here repeated:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

Dated, San Francisco,
November 6, 1929.

Respectfully submitted,

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No. 5953

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

TOSHIKO INABA,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, San Francisco, California,

Appellee.

BRIEF FOR APPELLEE

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No. 5953

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE.

Petitioner was born in Walnut Grove, County of Sacramento, State of California, on October 11, 1908. Petitioner, at the age of three, went to Japan on December 13, 1911, and there lived with her uncle, Juzo Inaba, her mother and father, Kazume Inaba and Hikotaro Inaba, remaining in the State of California. The petitioner remained in Japan until August 19, 1928, when she returned and sought entrance to the United States at the Port of San Francisco as a citizen of the United States, on September 3, 1928. On June 15, 1927, while so living in Japan, the petitioner mar-

ried Tirao Yamamoto, a citizen of the Empire of Japan, under the laws of Japan (Tr. p. 4). It is alleged in the petition for the writ that on September 22, 1927, four months after the marriage, the petitioner caused her family record to be changed so that she would not thereby be a member of the family of her husband, Torao Yamamoto. At the time petitioner sought entry to the United States at the Port of San Francisco on September 3, 1928, she was not possessed of a passport, or any visa endorsed thereon (Tr. p 5). but applied for admission as a citizen of the United States.

Thereafter, a hearing was had before a Board of Special Inquiry, and the Board denied petitioner admission in its decision of September 17, 1928, on the ground that she is a member of a race ineligible to citizenship, and had lost her American citizenship by marriage to an oriental. Thereafter, a rehearing was had on the matter before a Board of Special Inquiry, which denied petitioner admission on the same ground in its decision of November 5, 1928. Upon appeal to the Secretary of Labor, the Board of Review at Washington dismissed the appeal affirming the action of the Board of Special Inquiry here, in its decision of January 28, 1929.

Petitioner then filed a petition for a writ of habeas corpus in the District Court for the Southern Division of the Northern District of California, and a hearing was had on the order to show cause on March 25, 1929, at which time the matter was orally argued at length

by respective counsel, and ordered submitted on briefs before His Honor United States District Judge Harold Louderback. On August 22, 1929, the Court made its order denying the petition for the writ of habeas corpus, and dismissing the same. It is from that order that appellant appeals here.

ARGUMENT.

The Assignment of Errors (Tr. pp. 26, 27, 28, 29), and the appellant's opening brief raise, in the last analysis, two issues, so far as this Court is concerned:

> 1. HAVE THE IMMIGRATION AUTHORITIES MISCONSTRUED THE EXPATRIATION LAWS OF THE UNITED STATES?
>
> 2. DID THE IMMIGRATION AUTHORITIES ABUSE THE DISCRETION ENTRUSTED TO THEM IN FINDING AS A FACT THAT APPELLANT HAD LOST HER AMERICAN CITIZENSHIP THROUGH MARRIAGE?

1. What are the expatriation and immigration laws of the United States, applicable to the case at bar, and which, it is alleged, the Immigration Authorities have misinterpreted?

Section 3 of the Act of September 22, 1922 (8 U. S. C. A. Sec. 2) provides that:

> "A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage, unless she makes a formal renunciation of her citizenship before a Court having jurisdiction over naturalization of aliens: *Provided that any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States.*"

The position of the Government here is, therefore, precisely this:

> "Any woman citizen of the United States who marries an alien ineligible to citizenship shall herself cease to be a citizen.
>
> But Toshiko Inaba, petitioner herein married an alien ineligible to citizenship, Torao Yamamoto.
>
> Therefore, she has ceased to be a citizen of the United States."

The proof of the major is supplied by the citation of the Expatriation Act set forth above.

As to the minor the case of

Ozawa v. United States, 260 U. S. 178.

is decisive.

> "A Japanese born in Japan, being clearly not a Caucasian, is 'ineligible to citizenship' in the United States under Revised Statutes 2169 and the Naturalization Act."

Section 2169 R. S., which is part of the Naturalization Act, declares, "The provisions of this Title shall apply to aliens, being free white persons, and to aliens of African descent."

As to the question, "What is the effect, if any, of the termination of the marriage upon the status of the petitioner's citizenship under the laws of the United States," the statutory law is conclusive. Section 7 of the Expatriation Act of September 22, 1922, expressly repealed Section 3 of the earlier act of March 2, 1907, which provided for the resumption of American citizenship of American born women upon the termination

of the marital status. Hence a woman who has lost her citizenship can now only regain it on termination of the marriage by full compliance with the immigration and *naturalization* acts.

Section 7 reads:

> "Sec. 7. That Section 3 of the expatriation act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section. A woman who has resumed under such section citizenship lost by marriage shall, upon the passage of this act, have for all purposes the same citizenship status as immediately preceding her marriage."

Counsel for appellant in his opening brief devotes a great deal of attention to the question of "What was the effect of the marriage of petitioner and her subsequent separation from her husband? (Pages 4 to 15, Appellant's opening brief). The elaborate argument of the learned counsel will not bear analysis, however, for the following reasons.

At the outset he confronts us with an apparent dilemma (page 4, Appellant's opening brief), which may be conveniently stated thus:

> "Either the validity of the marriage of the petitioner is to be determined by the laws of Japan or by the laws of the State of California.
>
> But, under the laws of the State of California the marriage is void, and under the laws of Japan the marriage is void.
>
> Therefore, in either case, there is no marriage and the petitioner is still a citizen of the United States."

As to the first horn of the alleged dilemma, we deem it a sufficient answer to say that if the validity of the marriage is to be determined by the laws of Japan, as we contend it is, the question of determining what is the law of Japan is a question of fact, and not of law, and therefore, the finding of the executive branch of the Government is conclusive. For this reason we shall not enter into any discussion here as to what the law of Japan is, and what is its effect in this particular situation, for the reason that the determination of such question is outside the jurisdiction of this court in the absence of an abuse of discretion. We shall discuss the question of whether or not there was an abuse of discretion by the executive branch of the Government hereafter in considering what we perceive to be the second main issue presented here, and referred to above at the outset.

Our reason for maintaining that the question as to what is the law of Japan is outside the jurisdiction of this court, is this: What is the law of a foreign jurisdiction, is a question of fact. Any citation of authority upon this proposition would be superfluous, hence the finding of the executive branch of the Government on that question is conclusive. For where there is jurisdiction, a finding of fact by the executive department is conclusive.

U. S. v. Ju Toy, 198 U. S. 253;
Leong Shee v. White, 295 Fed. 665;
Gonzales v. U. S., 192 U. S. 1;
U. S. v. Arredondo, 6 Pet. 691 (at 729);
Quinby v. Conlan, 104 U. S. 420;
U. S. v. Calif. Land Co., 148 U. S. 41 (at p. 43);
Fung Tun v. Edell, 223 U. S. 673 (at 675).

As to the other horn of the alleged dilemma, namely, that the validity of the marriage should be determined by the laws of the State of California, this court has decisively settled that in the case of

> *Ng Suey Hi v. Weedin,* 21 Fed. (2d) 801, 9th Circuit, decided October 10, 1927.
>
> "The general rule is that the validity of a marriage is determined by the law of the place where it was contracted. If valid there it will be held valid everywhere. *38 Corpus Juris 1276.*"

Travers v. Reinhardt, 205 U. S. 423, 51 L. Ed. 865;
Gaines v. Relf, 13 L. Ed. 1071, 12 How. 472;
Hallet v. Collins, 10 How. 174, 13 L. Ed. 376;
Patterson v. Haines, 6 How. 550, 12 L. Ed. 553;
Ex parte Suzzana, 295 Fed. 713.

See also:

La Mar v. Micou, 112 U. S. 470, 471 to 473;
Tsoi Sim v. U. S., 116 Fed. 920;
Ex parte Goon Dip, 1 Fed. (2d) 811;
U. S. v. Day, 28 Fed. (2d) 44.

Plainly the validity of the marriage is to be determined not by the "lex domicilli" of the wife, or even of the husband, but by the "lex loci contractus", which, in this case, is the law of Japan.

We pause here to consider the contention made by counsel for appellant at page 12 of his opening brief: "Even if we concede there has been a marriage and no annulment, there has at the very least been a divorce or termination of the marriage, and *petitioner has the right to re-enter the United States for the purpose of regaining her citizenship.*"

Counsel claims that the case of

> *Yoshiko Hoshino,* No. 1466 United States District Court for the territory of Hawaii, decided November 22, 1927,

is authority for this contention. The case is authority for no such proposition. In that case a Japanese woman who was born in Hawaii, and *had lived in Hawaii all her life,* having lost her American citizenship by marriage to a Japanese alien, applied to the District Court of the Territory of Hawaii *for naturalization,* the marriage relation having terminated. The court took the view that the racial limitation upon naturalization, which restricts that privilege to "aliens being free white persons, and to aliens of African nativity and to persons of African descent", should not be considered applicable to persons who had once been American citizens by reason of birth, and hence that the petitioner was eligible to citizenship and might be naturalized.

The distinction is plain. There the question was: Whether or not a woman born in the Territory of the United States, who had never left the Territory of the United States, *who was at the time in the Territory of the United States,* could be naturalized. Here the question is: Whether a woman born in the United States, who has lost her American citizenship, who is not now in the United States, but is seeking entry, *can enter the country* as a citizen. What was involved there was the Naturalization Law; what is involved here is the Immigration Law.

If appellant is now an alien ineligible to citizenship as we contend she is, that fact merely provides an additional reason why she may not now enter the United States, for "no alien ineligible to citizenship shall be admitted to the United States" (8 U. S. C. A. 213). On the other hand, if appellant is not ineligible to citizenship, being an alien, her entry without an immigration visa is prohibited by Subdivision A of 8 U. S. C. A. 213:

> "No immigrant shall be admitted to the United States unless he has an unexpired immigration visa."

The petition itself shows that petitioner has no such visa. She could not enter without such a document even if she were of the white race and eligible to citizenship. That she is ineligible to citizenship is only one of the grounds upon which the Board found that she was inadmissible. The other ground is that she had not sustained the burden of proof imposed upon her by Section 23 of the Immigration Act of 1924 (8 U. S. C. A. Sec. 221), of showing that she is not subject to exclusion under any provision of the immigration laws. Her lack of an immigration visa of itself subjects her to exclusion under Section 13, cited supra.

As to the contention of counsel under discussion, viz., that petitioner should be permitted to enter the United States so that she may become naturalized, the mutual relation of the Immigration Laws to the Naturalization Laws is well defined in the case of

In re Jensen, 11 Fed. (2d) 414,

wherein the court said:

> "The Immigration Law defines the terms under which aliens may be admitted into the country, whilst the Naturalization Law prescribes how they may subsequently apply for the privilege of citizenship, which can in no case be claimed by them as a matter of right. These statutory provisions must therefore be strictly construed against the alien, upon whom the burden of proof rests to affirmatively show by competent evidence his compliance in detail with the Immigration Law and regulations, as a condition precedent to the filing of an application for citizenship under the Naturalization Law."

Further, Section 12 of the Immigration Act of 1924 (8 U. S. C. A. 212) provides:

> "An immigrant born in the United States who has lost his United States citizenship shall be considered as having been born in the country of which he is a citizen or subject, or if he is not a citizen or subject of any country, then of the country from which he comes."

We consider the above citation of authority to be decisive of the question raised by counsel at page 12 of Appellant's opening brief, to the effect that "petitioner has the right to re-enter the United States for the purpose of regaining her citizenship."

The case at bar, while not a usual one, is not novel. We here respectfully submit an authority that is precisely in point, and which counsel has neglected to mention in his opening brief.

> *Ex parte Fung Sing*, 6 Fed. (2d) 670, decided by United States District Judge Neterer for the Western District of Washington, July 1, 1925.

The facts in this case were as follows:

The petitioner was born in the State of Washington, in October, 1898, of Chinese parents. In 1903 she was taken by the parents to China, where in February, 1920, she married a citizen of China. Her husband died July 2, 1924. Thereafter, the petitioner arrived at the Port of Seattle in April, 1925, to return to the United States to resume her American citizenship. She was denied admission, because she is ineligible for citizenship, and excluded under the Immigration Act of 1924. She sought release under a writ of habeas corpus. An order to show cause was issued.

The court held that: "*A woman of Chinese race, born in the United States who married a Chinese citizen is for purposes of admission or citizenship on termination of the marital relation considered as born in the country of which she was a citizen, namely, China, and being of an excluded race, a citizen of an excluded racial country, was not eligible for citizenship and should not be admitted.*"

What distinction, if any, exists between the case of the Chinese woman and the Japanese woman whose case is at bar here?

This decision of Judge Neterer was approvingly cited by the United States Circuit Court of Appeals for the First Circuit in the case of

Lee Tai v. Tillinghast

as recently as November 27, 1928. (29 Fed. (2d) 350).

2. DID THE IMMIGRATION AUTHORITIES ABUSE THE DISCRETION ENTRUSTED TO THEM IN FINDING AS A FACT THAT APPELLANT HAD LOST HER AMERICAN CITIZENSHIP THROUGH MARRIAGE?

While this question is not so clearly set forth in Appellant's Opening Brief, we perceive it to be the ultimate question underlying the balance of the propositions contended for by Appellant in his opening brief, and the only question which this court must finally determine.

Appellant contends that "a case involving United States citizenship is "SUI GENERIS". It is no such thing. That no implied exception exists in the case of those, having once been citizens by birth, and who have lost their American citizenship, is clear from Section 12 of the Immigration Act of 1924 (8 U. S. C. A., Sec. 212) cited supra. Further,

> "A citizen of the United States who has become expatriated is in the same situation as though alien born."
>
> *Reynolds v. Haskins,* 8 Fed. (2d) 473, 11 C. J. 786;
>
> *United States v. Ju Toy,* 198 U. S. 252, at page 262.

> "It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as *when it is domicil and the belonging to a class excepted from the exclusion acts.* United

States v. Sing Tuck, 194 U. S. 161, 167; Lem Moon Sing v. United States, 158 U. S. 538, 546, 547."

Concluding the argument on this proposition, counsel states that the only contention made by him is that American citizenship could not be taken away on any trivial, unsatisfactory or frivolous grounds. If by this he means that this court should determine the question as we have stated it here, namely, whether or not the Immigration Authorities exceeded their jurisdiction or abused the discretion entrusted to them in finding as a fact that appellant had lost her American citizenship, we concur. But if he means that the case of an alien immigrant ineligible to citizenship, who was at one time a citizen of the United States, stands on any different footing, or should be regarded or treated any differently than the case of any other alien immigrant ineligible to citizenship, we must strongly dissent in view of the finality with which the authorities cited above settle that question.

Counsel then contend that:

"The decision of the Board of Special Inquiry and of the Secretary of Labor are erroneous in law, and that said officials have misconstrued the expatriation laws of the United States."

He then proceeds to cite the case of

Ex parte Hing, 22 Fed. (2d) 554,

still insisting that the case at bar is "sui generis", which contention we have just disposed of. We submit

that what the case of Ex parte Hing holds is simply this, and nothing more.

> "There is *no competent evidence* before the court to show that the applicant has been legally married, or that there has been consummated a relation which binds the applicant to her alleged husband, upon which she could predicate a claim for support, or inheritable right of a surviving spouse in the event of death."

The case of Ex parte Hing does specifically state, among other things, that

> "A person, however, may expatriate himself. 15 Stat. 223, Act July 27, 1868 (8 U. S. C. A. Secs. 13-15). The Congress may provide that marriage to an alien shall effect expatriation. McKenzie v. Hare, 239 U. S. 299, 36 S. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916 E-645; Act of Cong. Sept. 22, 1923, Sec. 3 (8 U. S. C. A. Sec. 9)."

And further:

> "This court may not take judicial notice of foreign laws or customs; the court must apply local laws and customs to any controverted fact, in the absence of proof."

And further, at page 556 (7, 8):

> *"If the applicant is legally married to an alien ineligible to citizenship, she has expatriated herself, and may not be admitted. Ex parte (Ng) Fung Sing supra."*

We cannot, therefore, agree with counsel when he says, (p. 19, Ap. Op. Br.) "That the Hing case unequivocably holds that in such a case as the case at bar

the court may go fully into the facts and is not bound by the findings of the Immigration Department", thereby implying that the petitioner is entitled to a hearing on the merits de novo. It is hardly necessary to point out that the inquiry, so far as this honorable court is concerned, is strictly limited to the legal question as to whether or not the executive branch of the Government, acting through the Immigration Authorities, has acted unfairly or capriciously, and denied the applicant a fair hearing.

Counsel then sets forth and discusses, (pages 20 to 24, Ap. Op. Br.) various authorities with which we find no occasion to disagree, for they are all ultimately to the effect that Congress has made the executive branch of the Government the sole and exclusive judge of the facts in cases of this character, and that the finding of the Executive Department is conclusive. All of the authorities cited by counsel, therefore, simply go to support the position that we have taken here. He apparently cites them, judging by the italicized portion of the quotations, upon the theory that "the case of an alien once a citizen is "sui generis", which contention we have already disposed of.

The Supreme Court of the United States in the case of

> *Ng Fung Ho v. White,* 259 U. S. 276, at page 282,

cited by counsel (pp. 25, 26, Ap. Op. Br.), lays down this rule:

> "If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. United States v. Ju Toy, 198 U. S. 253; Tang Tun v. Edsell, 223 U. S. 673."

It is then contended by appellant in the case at bar that "The finding of the Immigration Department is so palpably unsupported by the testimony of the witnesses, that such hearing is tantamount to an unfair hearing" (p. 24, App. Op. Br.). Anent this, he ultimately contends:

1. There has been a denial of a fair hearing.
2. The finding was not supported by the evidence.
3. That there was the application of an erroneous rule of law. (p. 26 App. Op. Br.)

It is conceded that these are questions which this court can decide.

As to 1 and 2, as to the law applicable here, we regard any extensive citation of authority as idle and superfluous, but for the sake of clarity we here state the law as we understand it to be, as so often and so recently clearly interpreted by this honorable court.

> *Chin Share Nging v. Nagle,* 27 Fed. (2d) 848, decided August 20, 1928, in which His Honor Judge Dietrich spoke for this court:
>
> "The law in such case is too well settled to require citation: The conclusions of administrative officers upon issues of fact are invulnerable in the courts, unless it can be said that they could not reasonably have been reached by a fair minded man, and hence are arbitrary."

See also

Gung You v. Nagle, C. C. A. 5809, decided September 23, 1929, opinion by His Honor United States Circuit Judge Wilbur, 34 Fed. (2d) 848,;

Quan Jue v. Nagle, C. C. A. 5868, decided October 28, 1929, opinion by United States Circuit Judge Dietrich;

Tse Yook Kee v. Weedin, C. C. A. 5909, decided November 25, 1929, opinion by United States Circuit Judge Dietrich.

The facts as disclosed by the transcript, which is before this court, are that the appellant, her father, and her brother, all testified that her marriage had taken place in accordance with the laws of Japan (Tr. pp. 15, 16, 17). The Japanese Consul General at San Francisco certified that "the registration of Toshiko Inaba into the family of Hanzo Yamamoto constituted legal marriage with Torao Yamamoto (Tr. p. 18).

Hence, it cannot be contended that there was no evidence to support the fact found by the executive officers that a lawful marriage had occurred. The father of the appellant testified that his formal consent was not necessary, as he entrusted the matter to his brother who arranged the marriage, appellant's father and uncle having discussed the matter when her afther was in Japan in 1926 (Tr. p. 17).

In view of this testimony, and such consistent undisputed testimony, can it be said that reasonable men could have come to any other conclusion but that ap-

pellant was legally married under the laws of Japan? We respectfully invite the court's attention to the fact that the argument of counsel for appellant, as set forth in his opening brief, on the fairness of the hearing, is based largely upon facts which do not appear in the record or in the transcript that is before this court. Counsel attempts to testify in his brief as to what is the law of Japan (App. Op. Br., pp. 5, 6, 8, 9), which, of course, is a question of fact which this court cannot inquire into. The place to establish these facts was before the fact finding tribunal, i.e., the Immigration Authorities, at the hearing *and rehearing.*

> "It is evident that petitioner sought relief from the court, not upon any ground advanced or relied upon when he was examined by the Immigration Officials, but upon a new ground, which is founded on truth, could and should have been brought to the attention of the executive authorities before judicial relief was sought."
>
> *Nagle v. Toy Young Quen,* 22 Fed. (2d) 18.

The record disclosed that the Immigration Authorities conceded that the re-registration of the appellant back into her own family was a legal termination of the marriage under Japanese law.

This brings us to a consideration of 3, that "There was the application of an erroneous rule of law", or, as formerly stated by appellant in his final contention,

> "There is a vital distinction between expatriation accomplished by an actual renunciation of allegiance by becoming a naturalized citizen of another country, than that brought about by the marriage of an American born woman to an alien ineligible to citizenship."

We prefer to state the question succinctly thus:

WHAT IS THE EFFECT OF A MARRIAGE OF A CITIZEN OF THE UNITED STATES UNDER SECTION 3 OF THE ACT OF SEPTEMBER 22, 1922, WHICH PROVIDES "THAT ANY WOMAN CITIZEN WHO MARRIES AN ALIEN INELIGIBLE TO CITIZENSHIP SHALL CEASE TO BE A CITIZEN OF THE UNITED STATES?"

In arguing that there is a distinction between expatriation accomplished by actual renunciation, and that brought about by marriage to an alien ineligible to citizenship, counsel evidently proceeds upon the theory that the case of a quondam citizen is "sui generis". His argument is, therefore, vitiated by an erroneous assumption, which we have disposed of heretofore. He states "that nowhere have we been able to find a case holding that where an American born woman has so lost her citizenship, she may not regain it, but must thenceforth be without a country." We again respectfully invite attention to Judge Neterer's decision in the case of *Ex parte Fung Sing,* cited and discussed supra. The argument is concluded at page 27 of the Opening Brief, which argument, by the way, is absolutely devoid of support by any authority whatsoever, with the statement that in the case of a loss of citizenship by renunciation, loss is irrevocable, and that in the case of marriage of a citizen to an alien ineligible to citizenship the loss is subject to the right to regain it upon termination of the marriage. We submit that the authorities are all the other way.

The leading case of

MacKenzie v. Hare, 239 U. S. 289,

in which the Supreme Court of the United States affirmed the decision of the Supreme Court of the State of California, is decisive.

> "The plaintiff was born and ever since has resided in the State of California. On August 14, 1909, being then a resident and citizen of this State and of the United States, she was lawfully married to Gordon Mackenzie, a native and subject of the kingdom of Great Britain. He had resided in California prior to that time, still resides here and it is his intention to make this State his permanent residence. He has not become naturalized as a citizen of the United States and it does not appear that he intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defendants to be registered as a voter. She was then over the age of twenty-one years and had resided in San Francisco for more than ninety days. Registration was refused to her on the ground that *by reason of her marriage to Gordon Mackenzie, a subject of Great Britain, she thereupon took the nationality of her husband and ceased to be a citizen of the United States.*"
>
> * * * * * * *
>
> "The question then is, Did she cease to be a citizen by her marriage?
>
> * * * * * * *
>
> "Its (the Act's) declaration is general, 'that any American woman who marries a foreigner shall take the nationality of her husband.' There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume her American citizenship if in the United States by simply remaining therein; if

abroad, by returning to the United States, or, within one year, registering as an American citizen. The act is therefore explicit and circumstantial. *It would transcend judicial power to insert limitations* or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate."

* * * * * * *

"It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of a national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. *It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.*"

* * * * * * *

"*All the courts have agreed, however, that the entire subject of naturalization and expatriation,*

including the method by which each might or could be accomplished and manifested, is a matter within the exclusive control of Congress."

* * * * * * *

"There is no escape from the conclusion that, under the provisions of this section, the plaintiff in this case, when she married Gordon Mackenzie, a British subject, thereupon took the nationality of her husband and ceased to be a citizen of the United States. Just as an alien woman who marries a citizen becomes a citizen herself, *whether she wishes it or not,* as the cases we have cited, declare, so a female citizen who marries an alien becomes herself an alien, whether she intends that result as the consequence of her marriage or not. *She must bow to the will of the nation as expressed by the act of Congress.* Owing to the possibilities of international complications, the rule has generally prevailed, from considerations of policy, that the wife should not have a citizenship, nor an allegiance, different from that of her husband. The section aforesaid was intended to put this general doctrine into statutory form. *When, after Congress by this act had declared that her marriage to an alien would accomplish her expatriation, she thereafter married an alien, she is conclusively presumed to have intended thereby to renounce her citizenship of the United States and become a subject of Great Britain."*

* * * * * * *

"As we have held that the act of the plaintiff here in marrying an alien was in effect a renunciation of her citizenship, it follows that she is not prevented from committing this act of expatriation by the aforesaid provision of the fourteenth amendment."

It will be observed that the facts in the Mackenzie case were even stronger than they are here. Neither Mackenzie nor the wife ever left California; she had always resided here; they were married under the laws

of this State, nor was the husband, as here, a member of a race ineligible to citizenship, yet the Supreme Court of this State and of the United States held that the effect of the marriage was to expatriate the wife.

Further the later statute which is invoked in the case at bar and applies here is even stronger. It declares in effect that marriage to an alien ineligible to citizenship *automatically* alters the *status* of the American wife.

SUMMARY AND CONCLUSION.

We have here, therefore, the case of one who, it is conceded, because of her birth in this country was a citizen of the United States, but who, it is contended, under the statute lost her citizenship because she married an alien ineligible to citizenship.

The marriage was consummated under the laws of the Empire of Japan. The validity of the marriage is to be determined by the lex loci contractus. What is the law of this foreign jurisdiction, Japan, is a question of fact, of which this court will not take judicial notice. Questions of fact are for the executive.

Where the Executive Branch of the Government, acting through the Immigration Authorities, makes a finding of fact, such finding is conclusive upon the judiciary, except where it appears that such finding could not have been reached by fair minded men, and hence is arbitrary. The record, as disclosed by the transcript, indicates no such abuse of discretion, but, on the contrary, shows that reasonable men could not

very well have come to any other conclusion. This is the law, and the fact that appellant here is a quondam citizen does not change the situation in any respect whatsoever.

Petitioner, if eligible to citizenship, can enter the country either as an immigrant, in which case she must have an immigration visa, or as a citizen. But petitioner has no immigration visa, and further, is now an alien ineligible to citizenship, and hence cannot enter the country for the purpose of becoming naturalized. Nor can she enter the country as a citizen, for she has ceased to be a citizen by her marriage to an alien ineligible to citizenship. This is the inescapable conclusion, because the effect of the statute in question is to automatically alter the status of the American wife.

The statute is far sweeping and general in its language and effect. It provides for no limitations or conditions and the Supreme Court of the United States says that "it would transcend judicial power to insert limitations or conditions." It is automatic in its operation, the act of marriage automatically produces expatriation, counsel has failed to point out any limitation or conditions for there are none, and we respectfully submit the statute involved here.

> "* * * A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens; provided, *that any woman citizen who*

marries an alien ineligible to citizenship shall cease to be a citizen of the United States."

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

WILLIAM A. O'BRIEN,
Asst. United States Attorney,
Attorneys for Appellee.

No. 5955

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH O. KOEPFLI, ROLAND P. BISHOP and WILLIAM T. BISHOP,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record.

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

[1*] DOCKET No. 14,006.

JOSEPH O. KOEPFLI, 1366 East 7th Street, Los Angeles, Calif.,

vs.

COMMISSIONER OF INTERNAL REVENUE.

For Taxpayer: RALPH W. SMITH, Esq.; SHERMAN JONES, Esq.

For Commissioner: C. T. BROWN, Esq., A. H. MURRAY, Esq.

DOCKET ENTRIES (JOSEPH O. KOEPFLI).

1926.

April 22. Petition received and filed.
May 1. Copy of petition served on solicitor.
" 1. Notification of receipt mailed taxpayer.
June 2. Answer filed by Solicitor.
" 24. Copy of answer served on taxpayer—Gen. Cal.

1928.

Feb. 20. Hearing set 4–17–28, Los Angeles, Calif.
Mar. 7. Hearing set 4–5–28, Los Angeles, Calif. Revised notice.
Apr. 11. Hearing had before Mr. Marquette. Submitted. Briefs due June 15, 1928.
" 23. Transcript of hearing—4–11 and 12–28 filed.
June 12. Brief filed by G. C.
" 13. Brief filed by taxpayer.

*Page-number appearing at the top of page of original certified Transcript of Record.

Oct. 4. Findings of fact and opinion rendered. Mr. Marquette. Judgment will be entered under Rule 50.

Nov. 8. Notice of settlement filed by G. C.

" 10. Hearing date set on settlement, 12–12–28.

Dec. 12. Hearing had before Mr. Milliken on Rule 50. Not contested. To Mr. Marquette for order.

" 17. Order of redetermination entered.

1929.

June 17. Petition for review by U. S. Cir. Ct. of App. (9) with assignments of error filed by taxpayer.

" 17. Proof of service filed.

" 17. Praecipe filed.

" 17. Proof of service filed.

" 22. Supplemental praecipe filed by taxpayer.

July 24. Proof of service of supplemental praecipe filed.

Aug. 1. Motion to fix amount of bond filed by taxpayer.

" 1. Motion to substitute bonds filed by taxpayer.

Now August 9, 1929, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[2] DOCKET No. 14,007.

ROLAND P. BISHOP, 1366 East 7th Street, Los Angeles, Calif.

vs.

COMMISSIONER OF INTERNAL REVENUE.

For Taxpayer: RALPH W. SMITH, Esq.; SHERMAN JONES, Esq.

For Commissioner: C. T. BROWN, Esq.; A. H. MURRAY, Esq.

DOCKET ENTRIES (ROLAND P. BISHOP).

1926.

April 22. Petition received and filed.
May 1. Copy of petition served on solicitor.
" 1. Notification of receipt mailed taxpayer.
June 2. Answer filed by Solicitor.
" 25. Copy of answer served on taxpayer—Gen. Cal.

1928.

Feb. 20. Hearing set 4–5–28, Los Angeles, Calif.
Apr. 11. Hearing had before Mr. Marquette, submitted. Briefs due June 15, 1928.
" 23. Transcript of hearing—4–11 and 12–28 filed. See 14,006.
May 18. Transcript of hearing of 4–4–28 filed.
June 12. Brief filed by G. C. See 14,006.
" 13. Brief filed by taxpayer. See 14,006.
Oct. 4. Findings of fact and opinion rendered. Mr. Marquette. Judgment will be entered under Rule 50.

Nov. 8. Notice of settlement filed by G. C.
" 10. Hearing date set on settlement, 12–12–28.
Dec. 12. Hearing had before Mr. Milliken on settlement under Rule 50 not contested. To Mr. Marquette for order.
" 17. Order of redetermination entered.

1929.

June 17. Petition for review by U. S. Cir. Ct. of App. (9) with assignments of error filed by taxpayer. See 14,006.
" 17. Proof of service filed. See 14,006.
" 17. Praecipe filed. See 14,006.
" 17. Proof of service filed. See 14,006.
" 22. Supplemental praecipe filed by taxpayer. See 14,006.
July 24. Proof of service of supplemental praecipe filed. See 14,006.
Aug. 1. Motion to fix amount of bond filed by taxpayer.
" 1. Motion to substitute bonds filed by taxpayer.

Now August 9, 1929, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[3] DOCKET No. 14,008.

WILLIAM T. BISHOP, 1366 East 7th Street, Los Angeles, Calif.

vs.

COMMISSIONER OF INTERNAL REVENUE.

For Taxpayer: RALPH W. SMITH, Esq.; SHERMAN JONES, Esq.

For Commissioner: C. T. BROWN, Esq.; A. H. MURRAY, Esq.

DOCKET ENTRIES (WILLIAM T. BISHOP).

1926.

April	22.	Petition received and filed.
May	1.	Copy of petition served on solicitor.
"	1.	Notification of receipt mailed taxpayer.
June	2.	Answer filed by solicitor.
"	25.	Copy of answer served on taxpayer—Gen. Cal.

1928.

Feb.	20.	Hearing set 4–5–28, Los Angeles, Calif.
Apr.	11.	Hearing had before Mr. Marquette. Submitted. Briefs due June 15, 1928.
"	23.	Transcript of hearing—4–11 and 12–28, filed. See 14,006.
May	18.	Transcript of hearing of April 4, 1928, filed. See 14,007.
June	12.	Brief filed by G. C. See 14,006.
"	13.	Brief filed by taxpayer. See 14,006.

Oct. 4. Findings of fact and opinion rendered. Mr. Marquette. Judgment will be entered under Rule 50.

Nov. 8. Notice of settlement filed by G. C.

" 10. Hearing date set on settlement 12–12–28.

Dec. 12. Hearing had before Mr. Milliken on settlement under Rule 50. Not contested. To Mr. Marquette for order.

" 17. Order of redetermination entered.

1929.

June 17. Petition for review by U. S. Cir. Ct. of App. (9) with assignments of error filed by taxpayer. See 14,006.

" 17. Proof of service filed. See 14,006.

" 17. Praecipe filed. See 14,006.

" 17. Proof of service filed. See 14,006.

" 22. Supplemental praecipe filed by taxpayer. See 14,006.

July 24. Proof of service of supplemental praecipe filed. See 14,006.

Aug. 1. Motion to fix amount of bond filed by taxpayer.

" 1. Motion to substitute bonds, filed by taxpayer.

Now August 9, 1929, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[4] Filed Apr. 22, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 14,006.

JOSEPH O. KOEPFLI, 1366 East 7th Street, Los Angeles, Calif.,

Petitioner,

vs.

THE COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION OF JOSEPH O. KOEPFLI.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter bearing the symbols IT:PA 1–60 D LPE–103, dated Feb. 23, 1926, and as a basis of his appeal sets forth the following:

(1) The taxpayer is an individual and a member of the partnership of Bishop & Company, with principal place of business at 1366 East 7th Street, Los Angeles, California.

(2) The deficiency letter (a copy of which is attached) is dated February 23, 1926, the date of mailing being unknown to the taxpayer.

(3) The tax in controversy is income tax for the calendar year 1922 and is less than $10,000.00, to wit, $9,371.87.

(4) The determination of tax contained in the said deficiency letter is based upon the following errors:

(a) The Commissioner has fixed a value as of March 1, 1913, for certain real property sold by the partnership of Bishop & Company in the year 1922 at $345,463.54, whereas the actual value of said property on March 1, 1913, was not less than $466,-132.27.

(b) The Commissioner has determined that a taxable profit was realized on the sale of said property equal to $152,901.39, whereas the actual taxable profit realized in connection with said sale was not in excess of $10,047.63.

[5] at the rate of 12½% whereas, taxpayer was liable for tax on one-third only of $10,047.63, representing his distributive share of the capital net gain arising from the sale of said property by the partnership of Bishop & Company, of which he was a member.

(d) Even if the March 1, 1913, value of the property as found by the Commissioner were used as the basis for determining the taxable profit realized on its sale, the correct taxable profit after making adjustment for subsequent improvements and depreciation distributable to the members of the partnership would be $147,091.04 and taxpayer's distributive share of such profit would be $49,030.-34 instead of $50,967.13 as found by the Commissioner.

(5) The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) The taxpayer is and was during the whole of the taxable year 1922, a member of the partnership of Bishop & Company, having a one-third interest in said partnership.

(b) During the year 1905, the partnership of Bishop & Company acquired 6.24 acres of land known as Leahy's Tract for which it paid $94,610.-74. During the year 1907, the partnership erected on said land, a concrete building costing $94,134.-19. Other improvements were added in 1908 and 1909 amounting to $5,543.73 and $21.92 respectively.

(c) During the year 1922, Bishop & Company sold the property for a net amount of $476,179.90.

(d) The land in question contained 273,427 square feet, and on June 27, 1925, it was appraised exclusive of improvements by the Los Angeles Realty Board as of March 1, 1913, at $382,797.80.

(e) The fair market value of the land, exclusive of the improvements, as of March 1, 1913, was $382,797.80. The fair value of the improvements on said date was equal to the cost thereof prior to March 1, 1913, or $99,699.84 and the fair value of land and improvements combined on March 1, 1913, was $482,497.64.

(f) The cost of improvements made subsequent to March 1, 1913, was $2,714.18. The depreciation sustained on said improvements for the period from March 1, 1913, to 1921, inclusive, amounted to $19,-079.55, and the March 1, 1913, value of the improvements plus cost of subsequent additions and less depreciation sustained up to January 1, 1922, was $83,334.47. The combined sum of said depreciated

value and the March 1, 1913, value of the land was $466,132.27.

(g) The capital net gain realized by the members of the partnership on the sale of said land and improvements in the year 1922, was the difference between the net selling price of $476,179.90 and $466,132.27, or $10,047.63, and taxpayer's one-third share of said capital net gain was $3,349.21.

[6] (6) The taxpayer in support of his appeal relies upon the following propositions of law:

(a) A deficiency of income tax, based upon a computation of net income arising from the sale of capital assets acquired prior to March 1, 1913, by a partnership of which a taxpayer is a member where a basis is used other than the actual March 1, 1913, value of the property, is erroneous. (Sec. 202, Revenue Act of 1921.)

(b) In arriving at the fair market value as of March 1, 1913, of capital assets sold, effect should be given to established values of other properties similarly situated and to the opinions of appraisers qualified to determine such value.

WHEREFORE, taxpayer prays that this Board may hear and determine his appeal.

Respectfully submitted,

JOSEPH O. KOEPFLI.

Dated this 17th day of April, 1926.

State of California,
County of Los Angeles,—ss.

Joseph O. Koepfli, of the city of Los Angeles, state and county aforesaid, being first duly sworn,

deposes and says that he is the taxpayer referred to in the foregoing petition; that he has read the petition or has had the same read to him and is familiar with the statements therein contained and that the facts stated are true except such facts as are stated to be upon information and belief and these facts he believes to be true.

JOSEPH O. KOEPFLI.

Subscribed and sworn to before me this 17th day of April, 1926.

[Seal] C. F. LONGLEY,

Notary Public in and for the County of Los Angeles, State of California.

Respectfully submitted.

CLAUDE I. PARKER,
Atty.
Per FRANK G. BUTTS,
J. P.,
910–912 Investment Bldg., Washington, D. C.

[7] TREASURY DEPARTMENT,
Washington.

Feb. 23, 1926.

Office of
Commissioner of Internal Revenue.
IT:PA–1–60D
LPE–103
Mr. Joseph O. Koepfli,
c/o Bishop and Company,
1366 East 7th St.,
Los Angeles, Calif.

Sir: The determination of your income tax lia-

bility for the years 1920 to 1922, as set forth in office letter dated February 14, 1925, has been changed as the result of a supplemental report, to disclose a deficiency in tax amounting to $12,081.94, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA–1–60D; LPE–103. In the event that you acquiesce in a part of the determination,

the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Inclosures:

Statements.
Agreement—Form A.
Form 882.

[8] IT:PA–1–60D
LPE–103

STATEMENT.

In re: Mr. JOSEPH O. KOEPFLI, c/o Bishop and Co., 1366 East 7th St., Los Angeles, Calif.

1920 Deficiency in Tax	$ 1,314.91
1921	1,395.16
1922	$ 9,371.87
Total	$12,081.94

On the basis of additional information furnished at a conference held in this office January 6, 1926, and in a supplemental report dated November 13, 1925, the following adjustments have been made in the audit of your returns:

1921.

It has been determined that your distributive interest from Bishop and Company is $69,791.84 instead of $71,636.69, as shown by the examining

officer in his original report. This adjustment is due to the allowance of bad debts amounting to $4,730.67.

Due to an adjustment made in accordance with your contentions the amount of profit realized from desert land sold has been decreased by $2,246.66.

An amount of $803.87 has been allowed the partnership, Bishop and Company, for drafting expense amortized over a period of ten years.

1922.

The distributive interest from Bishop and Company for this year has been determined to be $59,-338.94 and capital net gain of $50,967.13 due to the allowance of bad debts amounting to $4,529.90.

You are advised that the action of the examining officer in allowing a revised valuation of $345,463.54 on property sold in connection with the partnership, Bishop and Company, has been sustained inasmuch as an examination of all the facts discloses that this amount more nearly reflects the correct valuation. These adjustments result in the deficiency in tax as indicated above.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

Now August 9, 1929, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[9] Filed Jun. 2, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 14,006.

Appeal of JOSEPH O. KOEPFLI, Los Angeles, Calif.

ANSWER OF JOSEPH O. KOEPFLI.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations of Paragraph 1 of the petition.

(2) Admits the allegations of Paragraph 2 of the petition.

(3) Admits the allegations of Paragraph 3 of the petition.

(4) Denies that the Commissioner committed the errors alleged in Paragraph 4 of the petition.

(5) Admits the allegations of subdivisions (a), (b) and (c) of Paragraph 5; admits that the land in question contained 273,427 sq. ft.; denies that said land was appraised, exclusive of improvements, at $382, 797.80; denies the allegations of subdivisions (e), (f) and (g) of Paragraph 5.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.
Of Counsel:
L. C. MITCHELL,
Special Attorney, Bureau of Internal Revenue.

Now, August 9, 1929, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[10] Filed Apr. 22, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 14,007.

ROLAND P. BISHOP, 1366 East 7th Street, Los Angeles, California,

Petitioner,

vs.

THE COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION OF ROLAND P. BISHOP.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal

Revenue set forth in his deficiency letter bearing the symbols IT:PA 1–60D, LPE–103, dated February 23, 1926, and as a basis of his appeal sets forth the following:

(1) The taxpayer is an individual and a member of the partnership of Bishop & Company with principal place of business at 1366 East 7th Street, Los Angeles, California.

(2) The deficiency letter, copy of which is attached, is dated February 23, 1926, the date of mailing being unknown to the taxpayer.

(3) The tax in controversy is income tax for the calendar year 1922 and is less than $10,000.00, to wit, $8,147.02.

(4) The determination of tax contained in said deficiency letter is based upon the following errors:

(a) The Commissioner has fixed a value as of March 1, 1913, for certain real property sold by the partnership of Bishop & Company in the year 1922, at $345,463.54, whereas, the actual value of said property as of March 1, 1913, was not less than $466,132.27.

(b) The Commissioner has determined that a taxable profit was realized by the members of the partnership of Bishop & Company, on the sale of said property equal to $152,901.39, whereas, the actual taxable profit realized in connection with said sale was not in excess of $10,047.63.

(c) The Commissioner has included $50,967.13 as taxpayer's distributive share of said alleged profit subject to tax as a capital net gain and has

computed a tax on such alleged distributive share [11] at the rate of 12½% whereas, taxpayer was liable for tax on one-third only of $10,047.63, representing his distributive share of the capital net gain arising from the sale of said property by the partnership of Bishop & Company of which he was a member.

(d) Even if the March 1, 1913, value of the property as found by the Commissioner were used as the basis for determining the taxable profit realized on its sale, the correct taxable profit after making adjustment for subsequent improvements and depreciation distributable to the members of the partnership would be $147,091.04 and taxpayer's distributive share of such profit would be $49,030.34 instead of $50,967.13 as found by the Commissioner.

(5) The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) The taxpayer is and was during the whole of the taxable year 1922, a member of the partnership of Bishop & Company, having a one-third interest in said partnership.

(b) During the year 1905, the partnership of Bishop & Company acquired 6.24 acres of land known as Leahy's Tract for which it paid $94,610.74. During the year 1907, the partnership erected on said land a concrete building costing $94,134.19. Other improvements were added in 1908 and 1909 amounting to $5,543.73 and $21.92 respectively.

(c) During the year 1922, Bishop & Company sold the property for a net amount of $476,179.90.

(d) The land in question contained 273,427 square feet, and on June 27, 1925, it was appraised exclusive of improvements by the Los Angeles Realty Board as of March 1, 1913, at $382,797.80.

(e) The fair market value of the land, exclusive of the improvements, as of March 1, 1913, was $382,797.80. The fair value of the improvements on said date was equal to the cost thereof prior to March 1, 1913, or $99,699.84 and the fair value of land and improvements combined on March 1, 1913, was $482,497.64.

(f) The cost of improvements made subsequent to March 1, 1913, was $2,714.18. The depreciation sustained on said improvements for the period from March 1, 1913 to 1921 inclusive, amounted to $19,-079.55 and the March 1, 1913, value of the improvements plus cost of subsequent additions and less depreciation sustained up to January 1, 1922, was $83,334.47. The combined sum of said depreciated value and the March 1, 1913, value of the land was $466,132.27.

(g) The capital net gain realized by the members of the partnership on the sale of said land and improvements in the year 1922, was the difference between the net selling price of $476,179.90 and $466,-132.27, or $10,047.63, and taxpayer's one-third share of said capital net gain was $3,349.21.

[12] (6) The taxpayer in support of his appeal relies upon the following propositions of Law:

(a) A deficiency income tax based upon a computation of net income arising from the sale of capi-

tal assets acquired prior to March 1, 1913, by a partnership of which a taxpayer is a member where a basis is used other than the actual March 1, 1913, value of the property, is erroneous. (Section 202, Revenue Act of 1921.)

(b) In arriving at the fair market value as of March 1, 1913, of capital assets sold, effect should be given to established values of other properties similarly situated and to the opinions of appraisers qualified to determine such value.

WHEREFORE, taxpayer prays that this Board may hear and determine his appeal.

Respectfully submitted,

ROLAND P. BISHOP.

Dated this 17th day of April, 1926.

State of California,
County of Los Angeles,—ss.

Roland P. Bishop, of the city of Los Angeles, state and county aforesaid, being first duly sworn, deposes and says that he is the taxpayer referred to in the foregoing petition; that he has read the petition or has had the same read to him and is familiar with the statements therein contained and that the facts stated are true except such facts as are stated to be upon information and belief and these facts he believes to be true.

ROLAND P. BISHOP.

Subscribed and sworn to before me this 17th day of April, 1926.

[Seal] C. F. LONGLEY,
Notary Public in and for the County of Los Angeles, State of California.

Respectfully submitted.

CLAUDE I. PARKER,
Atty.
Per FRANK G. BUTTS,
J. P.,
910–912 Investment Bldg., Washington, D. C.

[13] TREASURY DEPARTMENT,
Washington.

IT:PA–1–60D. Feb. 23, 1926.
LPE–103.

Mr. Roland P. Bishop,
c/o Bishop and Co.,
1366 East 7th St.,
Los Angeles, Calif.

Sir: The determination of your income tax liability for the years 1920 to 1922, inclusive, as set forth in office letter dated February 14, 1925, has been changed as a result of a supplemental report, to disclose a deficiency in tax amounting to $12,-457.99 for 1920 and 1922 and an overassessment amounting to $2,439.85 for 1921, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within

which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA–1–60D; LPE–103 In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner,
By (C. R. NASH),
Assistant to the Commissioner.

Inclosures:
Statements.
Agreement—Form A.
Form 882.

[14] STATEMENT.

IT:PA–1–60D.
LPE–103.

In re: Mr. ROLAND P. BISHOP, c/o Bishop and Company, 1366 East 7th Street, Los Angeles, California.

Year.	Deficiency.	Overassessment.
1920	$ 4,310.97	$
1921		2,439.85
1922	8,147.02	
Totals	$12,457.99	$ 2,439.85

On the basis of additional information furnished at a conference held in this office January 6, 1926, and in a supplemental report dated November 13, 1925, the following adjustments have been made in the audit of your returns:

1921.

It has been determined that your distributive interest from Bishop and Company is $69,791.84 instead of $71,636.69, as shown by the examining officer in his original report. This adjustment is due to the allowance of bad debts amounting to $4,730.67.

Due to an adjustment made in accordance with your contentions the amount of profit realized from desert land sold has been decreased by $2,246.66.

An amount of $803.87 has been allowed the part-

nership, Bishop and Company, for drafting expense amortized over a period of ten years.

The profit realized from the sale of surface rights has been computed as follows:

Sold surface rights, only 27½ acres	$20,625.00
Less: Commissions	1,744.37
	$18,880.63
Corrected valuation	13,750.00
Profit realized	$ 5,130.63

1922.

The distributive interest from Bishop and Company for this year has been determined to be $59,338.94 and capital net gain of $50,967.13 due to the allowance of bad debts amounting to $4,529.90.

[15] You are advised that the action of the examining officer in allowing a revised valuation of $345,463.54 on property sold in connection with the partnership, Bishop and Company, has been sustained inasmuch as an examination of all the facts discloses that this amount more nearly reflects the correct valuation. These adjustments result in the deficiency in tax as indicated above.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of

the Collector of Internal Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years, and the balance if any, will be refunded by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded since a portion may be an assessment which has been entered but not paid.

The appeal referred to on page one applies only to any deficiency in tax set forth herein inasmuch as there is no provision in the Revenue Act of 1924 for appeals on overassessments.

In order to fully protect yourself against the running of the Statute of Limitations with respect to any apparent overassessment in your return due to this adjustment of your husband's return, it is suggested that you immediately file with the Collector of Internal Revenue for your district, a claim on the enclosed Form 843 the basis of which may be as set forth herein.

Now, August 9, 1929, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[16] Filed Jun. 2, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 14,007.

Appeal of ROLAND P. BISHOP, Los Angeles, California.

ANSWER OF ROLAND P. BISHOP.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations of Paragraph 1 of the petition.

(2) Admits the allegations of Paragraph 2 of the petition.

(3) Admits the allegations of Paragraph 3 of the petition.

(4) Denies that the Commissioner committed the errors alleged in Paragraph 4 of the petition.

(5) Admits the allegations of subdivisions (a), (b) and (c) of Paragraph 5; admits that the land in question contained 273,427 sq. ft.; denies that said land was appraised, exclusive of improvements, at $382,797.80; denies the allegations of subdivisions (e), (f) and (g) of Paragraph 5.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.
Of counsel:
L. C. MITCHELL,
Special Attorney, Bureau of Internal Revenue.

Now August 9, 1929, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[17] Filed Apr. 22, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 14,008.

WILLIAM T. BISHOP, 1366 East 7th Street, Los Angeles, California,

Petitioner,

vs.

THE COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION OF WILLIAM T. BISHOP.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter bearing

the symbols IT: PA: 1–60D, LPE–103, dated February 23, 1926, and as a basis of his appeal sets forth the following:

(1) The taxpayer is an individual and a member of the partnership of Bishop & Company with principal place of business at 1366 East 7th Street, Los Angeles, California.

(2) The deficiency letter, copy of which is attached, is dated February 23, 1926, the date of mailing being unknown to the taxpayer.

(3) The tax in controversy is income tax for the calendar year 1922 and is less than $10,000.00, to wit, $8,178.47.

(4) The determination of tax contained in said deficiency letter is based upon the following errors:

(a) The Commissioner has fixed a value as of March 1, 1913, for certain real property sold by the partnership of Bishop & Company in the year 1922, at $345,463.54, whereas, the actual value of said property as of March 1, 1913, was not less than $466,132.27.

(b) The Commissioner has determined that a taxable profit was realized by the members of the partnership of Bishop & Company, on the sale of said property equal to $152,901.39, whereas, the actual taxable profit realized in connection with said sale was not in excess of $10,047.63.

(c) The Commissioner has included $50,967.13 as taxpayer's distributive share of said alleged profit subject to tax as a capital net gain and has computed a tax on such alleged distributive share

[18] at the rate of 12½% whereas, taxpayer was liable for tax on one-third only of $10,047.63 representing his distributive share of the capital net gain arising from the sale of said property by the partnership of Bishop & Company of which he was a member.

(d) Even if the March 1, 1913, value of the property as found by the Commissioner were used as the basis for determining the taxable profit realized on its sale, the correct taxable profit after making adjustment for subsequent improvements and depreciation distributable to the members of the partnership would be $147,091.04 and taxpayer's distributive share of such profit would be $49,030.34 instead of $50,967.13 as found by the Commissioner.

(5) The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) The taxpayer is and was during the whole of the taxable year 1922, a member of the partnership of Bishop & Company, having a one-third interest in said partnership.

(b) During the year 1905, the partnership of Bishop & Company acquired 6.24 acres of land known as Leahy's Tract for which it paid $94,-610.74. During the year 1907, the partnership erected on said land a concrete building costing $94,134.19. Other improvements were added in 1908 and 1909 amounting to $5,543.73 and $21.92 respectively.

(c) During the year 1922, Bishop & Company sold the property for a net amount of $476,179.90.

(d) The land in question contained 273,427 square feet, and on June 27, 1925, it was appraised exclusive of improvements by the Los Angeles Realty Board as of March 1, 1913, at $382,797.80.

(e) The fair market value of the land, exclusive of the improvements, as of March 1, 1913, was $382,797.80. The fair value of the improvements on said date was equal to the cost thereof prior to March 1, 1913, or $99,699.84 and the fair value of land and improvements combined on March 1, 1913, was $482,497.64.

(f) The cost of improvements made subsequent to March 1, 1913, was $2,714.18. The depreciation sustained on said improvements for the period from March 1, 1913 to 1921, inclusive, amounted to $19,-079.55 and the March 1, 1913, value of the improvements plus cost of subsequent additions and less depreciation sustained up to January 1, 1922, was $83,334.47. The combined sum of said depreciated value and the March 1, 1913, value of the land was —$466,132.27.

(g) The capital net gain realized by the members of the partnership on the sale of said land and improvements in the year 1922, was the difference between the net selling price of $476,179.90 and $466,132.27, or $10,047.63 and taxpayer's one-third share of said capital net gain was $3,349.21.

[19] (6) The taxpayer in support of his appeal relies upon the following propositions of law:

(a) A deficiency income tax based upon a computation of net income arising from the sale of capital assets acquired prior to March 1, 1913, by

a partnership of which a taxpayer is a member where a basis is used other than the actual March 1, 1913, value of the property, is erroneous. (Section 202, Revenue Act of 1921.)

(b) In arriving at the fair market value as of March 1, 1913, of capital assets sold, effect should be given to established values of other properties similarly situated and to the opinions of appraisers qualified to determine such values.

WHEREFORE, taxpayer prays that this Board may hear and determine his appeal.

Respectfully submitted,

WILLIAM T. BISHOP.

Dated this 17th day of April, 1926.

State of California,
County of Los Angeles,—ss.

William T. Bishop, of the city of Los Angeles, state and county aforesaid, being first duly sworn deposes and says that he is the taxpayer referred to in the foregoing petition; that he has read the petition or has had the same read to him and is familiar with the statements therein contained and that the facts stated are true except such facts as are stated to be upon information and belief and these facts he believes to be true.

WILLIAM T. BISHOP.

Subscribed and sworn to before me this 17th day of April, 1926.

[Seal] C. F. LONGLEY,

Notary Public in and for the County of Los Angeles, State of California.

Respectfully submitted.

CLAUDE I. PARKER,
Atty.
Per FRANK G. BUTTS,
J. P.,
910–912 Investment Bldg., Washington, D. C.

[20] TREASURY DEPARTMENT,
Washington, D. C.
Feb. 23, 1926.

IT:PA–1–60D.
LPE–103.

Mr. William T. Bishop,
c/o Bishop and Company,
1366 East 7th, Street,
Los Angeles, California.

Sir:

The determination of your income tax liability for the years 1919 to 1922, inclusive, as set forth in office letter dated Feb. 14, 1925, has been changed as a result of the supplemental report, to disclose an overassessment of $547.75 for 1919 and a deficiency in tax for the years 1920, 1921 and 1922 amounting to $11,959.70, as shown in the attached statement.

In accordance with the provisions of Section 274

of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA–1–60D, LPE–103. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Enclosures:

Statements.
Agreement—Form A.

[21] IT:PA–1–60D.
LPE–103.

STATEMENT.

Feb. 23, 1926.

In re: Mr. WILLIAM T. BISHOP, c/o Bishop and Company, 1366 East 7th St., Los Angeles, California.

	Deficiency in Tax.	Overassessment.
1919		$547.75
1920	$ 1,325.06	
1921	2,456.17	
1922	8,178.47	
Total	$11,959.70	

On the basis of additional information furnished at a conference held in this office January 6, 1926, and in a supplemental revenue agent's report dated November 13, 1925, the following adjustments have been made in the audit of your returns:

1919.

The amount of $1,000.00 representing a loss in connection with the Belmont Monitor Mining Company stock has been allowed as a deduction in 1919 in accordance with the additional information furnished.

This adjustment discloses an overassessment as indicated above.

1920.

It has been determined that your distributive interest from Bishop and Company is $69,791.84 instead of $71,636.69 as shown by the examining officer

in his original report. This adjustment resulted from the allowance of bad debts in the amount of $4,730.67.

Due to an adjustment made in accordance with your contentions the amount of profit realized from desert land sold has been decreased by $2,246.66.

An amount of $803.87 has been allowed the partnership, Bishop and Company, for drafting expense amortized over a period of ten days.

These adjustments disclose a deficiency in tax as indicated above.

1922.

The distributive interest from Bishop and Company for this year has been determined to be $59,338.94 and capital net gain of $50,967.13 due to the allowance of bad debts amounting to $4,529.90.

[22] You are advised that the action of the examining officer in allowing a revised valuation of $345,463.54 on property sold in connection with the partnership, Bishop and Company, has been sustained inasmuch as an examination of all the facts discloses that this amount more nearly reflects the correct valuation.

These adjustments result in the deficiency in tax as indicated above.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of

the Collector of Internal Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded since a portion of the tax may be an assessment which has been entered but not paid.

The appeal referred to on page one of this letter applies to any deficiency in tax set forth herein inasmuch as the Revenue Act of 1924 does not provide for appeals on overassessments.

Now August 9, 1929, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[23] Filed Jun. 2, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 14,008.

Appeal of WILLIAM T. BISHOP, Los Angeles, Calif.

ANSWER OF WILLIAM T. BISHOP.

The Commissioner of Internal Revenue, by his

attorney A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations of Paragraph 1 of the petition.

(2) Admits the allegations of Paragraph 2 of the petition.

(3) Admits the allegations of Paragraph 3 of the petition.

(4) Denies that the Commissioner committed the errors alleged in Paragraph 4 of the petition.

(5) Admits the allegations of subdivisions (a), (b) and (c) of Paragraph 5; admits that the land in question contained 273,427 sq. ft.; denies that said land was appraised, exclusive of improvements, at $382,797.80; denies the allegations of subdivisions (e), (f) and (g) of Paragraph 5.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.
Of counsel.
L. C. MITCHELL,
Special Attorney, Bureau of Internal Revenue.

Now August 9, 1929, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[24] A true copy. Teste:

[Seal] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 14,006, 14,007, 14,008.

JOSEPH O. KOEPFLI,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ROLAND P. BISHOP,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

WILLIAM T. BISHOP,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

FINDINGS OF FACT AND OPINION.

Promulgated October 4, 1928.

March 1, 1913, value of certain real estate fixed, and determination of respondent overruled.

ROGER W. SMITH, Esq., and SHERMAN JONES, Esq., for the Petitioners.

CLARK T. BROWN, Esq., for the Respondent.

These proceedings are for the redetermination of deficiencies in income taxes asserted by the respondent for the year 1922. The deficiencies amount to $9,371.87; $8,147.02 and $8,178.47, respectively, in the order above named. They arise from the disallowance by the respondent of the petitioner's claim as to the March 1, 1913, value of certain real estate owned by the petitioners and sold by them in 1922.

FINDINGS OF FACT.

The three petitioners were for many years prior to 1922, and all during that year, partners in the firm of Bishop and Company. Each owned a one-third interest. In 1905 they purchased a tract of 6.24 [25] acres of land lying along 8th Street, between Alameda and Lawrence Streets, in the city of Los Angeles, California. The purchase price was $94,610.74. In 1907 they put up a concrete building on the property at a cost of $94,134.19. In 1908 and 1909 other improvements were erected amounting to $5,543.73 and $21.92, respectively. The land and buildings were sold by the petitioners in 1922

for $500,000, the net to petitioners being $476,-179.90. Spur lines from two railroads ran to this land and it was the only available tract of any considerable size suitable for manufacturing purposes, and "close in" to the then business center of the city. At the time of its purchase and for some years thereafter, proximity to the business center was very desirable in a manufacturing site. The original purchase price in 1905 was approximately the fair value of the land, and by March 1, 1913, its value without improvements was $382,797.80. There is no evidence regarding the amount of depreciation upon the buildings.

About the year 1915 the real estate market in Los Angeles went into a bad slump, and no recovery took place for five or six years. By 1922, however, the market had recovered at least its status of March 1, 1913, and by 1923 it reached its peak. But by that time large industrial sites "close in" were not in much demand, as factories had gone further out to get cheaper land.

[26] The contention of the petitioners is, that the March 1, 1913, value of the property sold by them in 1922 was $466,132.27, and that the net taxable gain was only $10,047.63. The respondent determined the March 1, 1913, value to be $345,463.54 resulting in a net taxable gain of $152,901.39, or $50,967.13 to each partner. No other questions are presented.

OPINION.

MARQUETTE.—The best evidence of market value is the selling price of property, between one

willing but not compelled to sell, and one willing but not compelled to buy. Measured by that standard, the petitioners paid, in 1905, the then fair market value of the land. This was $94,610.74. There is no evidence before us as to sales of similar property on or about March 1, 1913. But, as of that date, the Los Angeles Real Estate Board in 1925 appraised the land as having a value of $382,797.80. This valuation is substantiated by other evidence.

The buildings upon the land in 1913 cost $94,134.19 and $5,543.73, respectively. The first was erected during the year 1907 and the second during 1908. Presumably, these buildings were subject to depreciation. It is quite evident that, in fixing a valuation as of March 1, 1913, the respondent did compute some depreciation on these buildings; but how much, we are not advised. There is no evidence to indicate what rate of depreciation was used by the respondent, nor whether that was the correct rate. We only know that the respondent [27] determined the land and buildings had a market value March 1, 1913, of $345,463.54. This was $37,334.26 less than the value of the land alone, as disclosed by the evidence.

While it is probable that the buildings had some value on March 1, 1913, the evidence produced fails to touch upon this matter. The petition does contain an allegation as to the March 1, 1913, value of the buildings; but this is flatly denied in the answer. The burden of proof was upon the taxpayer and he has failed to sustain it. In recomputing the taxes, therefore, the rate of depreciation of the

buildings, already used by the respondent, will stand as correct.

The amount of taxable gain resulting from the same of this property should be recomputed, based upon a value of $382,797.80 for the land plus the depreciated value of the buildings, all as of March 1, 1913.

Judgment will be entered under Rule 50.

Now August 9, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[28] United States Board of Tax Appeals.

DOCKET No. 14,006.

JOSEPH O. KOEPFLI,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER REDETERMINING DEFICIENCY (JOSEPH O. KOEPFLI).

Pursuant to the decision of the Board promulgated October 4, 1928, the respondent having on November 8, 1928, filed a proposed redetermination of the deficiency herein and the same having been called for hearing on December 12, 1928, pursuant

to notice thereof to the petitioner and no objection having been made thereto, it is

ORDERED AND DECIDED, upon redetermination, that the petitioner's deficiency in tax for the year 1922 is $3,890.38.

JOHN J. MARQUETTE,
JOHN J. MARQUETTE,
Member, United States Board of Tax Appeals.

Entered Dec. 17, 1928.

A true copy: Teste.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now August 9, 1929, the foregoing order of redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[29] United States Board of Tax Appeals.

DOCKET No. 14,007.

ROLAND P. BISHOP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER REDETERMINING DEFICIENCY (ROLAND P. BISHOP).

Pursuant to the decision of the Board promulgated October 4, 1928, the respondent having on

November 8, 1928, filed a proposed redetermination of the deficiency herein and the same having been called for hearing on December 12, 1928, pursuant to notice thereof to the petitioner and no objection having been made thereto, it is

ORDERED AND DECIDED, upon redetermination, that the petitioner's deficiency in tax for the year 1922 is $2,665.53.

JOHN J. MARQUETTE,
Member, United States Board of Tax Appeals.

Entered Dec. 17, 1928.

A true copy: Teste.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now August 9, 1929, the foregoing order of redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[30] United States Board of Tax Appeals.

DOCKET No. 14,008.

WILLIAM T. BISHOP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER REDETERMINING DEFICIENCY (WILLIAM T. BISHOP).

Pursuant to the decision of the Board promulgated October 4, 1928, the respondent having on November 8, 1928, filed a proposed redetermination of the deficiency herein and the same having been called for hearing on December 12, 1928, pursuant to notice thereof to the petitioner, and no objection having been made thereto, it is

ORDERED AND DECIDED, upon redetermination, that the petitioner's deficiency in tax for the year 1922 is $2,696.94.

JOHN J. MARQUETTE,
Member, United States Board of Tax Appeals.

Entered Dec. 17, 1928.

A true copy: Teste.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now August 9, 1929, the foregoing order of redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[31] Before the United States Board of Tax Appeals.

DOCKET Nos. 14,006, 14,007 and 14,008.

JOSEPH O. KOEPFLI, ROLAND P. BISHOP, and WILLIAM T. BISHOP,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF PRESENTATION OF PETITIONS OF JOSEPH O. KOEPFLI, ROLAND P. BISHOP, AND WILLIAM T. BISHOP.

To C. M. CHAREST, Esq., General Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for the Respondent.

Sir: Please take notice that on this 17th day of June, 1929, the undersigned has presented to this Board and filed with the Clerk thereof the petition of Joseph O. Koepfli, Roland P. Bishop and William T. Bishop, copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the final order and decision of the Board in the above-entitled proceeding.

CLAUDE I. PARKER,

Attorney, Parker and Smith, 808 Bank of America Bldg., Los Angeles, California.

Of counsel:

FRANK G. BUTTS,

910–12 Investment Bldg., Washington, D. C.

Receipt of the above petition acknowledged this 17th day of June, 1929.

C. M. CHAREST,

Esq.,

Gen. Counsel, Bureau Internal Revenue,

Attorney for Respondent.

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[32] Filed June 17, 1929.

United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH O. KOEPFLI, ROLAND P. BISHOP, and WILLIAM T. BISHOP,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Joseph O. Koepfli, Roland P. Bishop and William T. Bishop, in support of this, their petition for the review of the decision of the United States

Board of Tax Appeals rendered on the 17th day of December, 1928, determining a deficiency in income and profits taxes of the petitioners for the calendar year 1922 in the respective amounts of $3,890.38, $2,665.53 and $2,696.94, respectfully show to this Honorable Court as follows:

I.

STATEMENT OF THE CASE.

1. On April 22, 1926, the petitioners filed with the United States Board of Tax Appeals in pursuance of the provisions of the Revenue Act of 1926, their petitions requesting the redetermination of deficiencies in income and excess profits taxes for the calendar year 1922, amounting to $9,371.87 against Joseph O. Koepfli, $8,147.08 against Roland P. Bishop and $8,178.47 against William T. Bishop, as shown by the final notices of deficiencies previously mailed by the respondent under date of February 23, 1926. These petitions, which were consolidated for [33] the purpose of hearing, alleged as follows:

That the petitioners were individuals residing in Los Angeles, California, and during the year 1922 they were equal members of the partnership of Bishop & Company, which partnership was engaged in business in Los Angeles, California. During the year 1905 the partnership of Bishop & Company acquired 6.24 acres of land for which it paid $94,-610.74. During the year 1907 the partnership erected buildings on said property at a cost of $94,-

134.19 and in 1908 and 1909 added other improvements to said property in the amounts of $5,543.73 and $21.92 respectively.

That in 1922 the land and buildings were sold by the petitioners for $500,000.00, the net price to them being $476,179.90. That said land, exclusive of the improvements, had a fair market value as of March 1, 1913, of $382,797.80. That the fair market value as of 1913 of the improvements was equal to the cost thereof prior to March 1, 1913, or $99,699.84.

That the respondent erred in failing to allow as a fair market value as of March 1, 1913, of said land and improvements the values as aforesaid.

2. That thereafter, on or about June 22, 1926, the respondent filed with the said Board its answer to the said petitions which answer admitted that the taxpayers resided in Los Angeles and were equal members of the partnership of Bishop & Company; admitted the acquisition in 1905 by the partnership of Bishop & Company of the said land at the said cost of $94,610.74; admitted the improvements and the costs of said improvements added to said land in the years 1907, 1908 and 1909 as alleged in the petition. And further admitted that the respondent had mailed to the petitioners notices of deficiency showing the deficiencies as alleged in the petitions for the calendar year 1922 and that the date of mailing of said notices of deficiency was as alleged in said petitions, to wit: February 23, 1926; but denied that said land had [34] a fair market value as of March 1, 1913, of

the amount alleged of $382,797.80, or that the improvements had a fair market value as of March 1, 1913, of $99,699.84.

3. The cause being at issue under the rules of practice of said Board upon the filing of such answer, duly came on for hearing on April 11th and 12th, 1928, at which time the petitioners, by competent witnesses, submitted testimony in support of the allegations as aforesaid. Thereafter, on October 4, 1928, the said Board rendered its findings of fact in substantial accordance with the facts as alleged in the petitions and as hereinbefore set forth, further finding, however, that

> "The buildings upon the land in 1913 cost $94,134.19 and $5,543.73, respectively. The first was erected during the year 1907 and the second during 1908. Presumably, these buildings were subject to depreciation. It is quite evident that, in fixing a valuation as of March 1, 1913, the respondent did compute some depreciation on these buildings; but how much, we are not advised. There is no evidence to indicate what rate of depreciation was used by the respondent, nor whether that was the correct rate. We only know that the respondent determined the land and buildings had a market value March 1, 1913 of $345,463.54. This was $37,334.26 less than the value of the land alone, as disclosed by the evidence.
>
> "While it is probable that the buildings had some value on March 1, 1913, the evidence produced fails to touch upon this matter. The

petition does contain an allegation as to the March 1, 1913 value of the buildings; but this is flatly denied in the answer. The burden of proof was upon the taxpayer and he has failed to sustain it. In computing the taxes, therefore, the rate of depreciation of the buildings, already used by the respondent, will stand as correct."

The said Board on the said date also rendered its opinion in which it concluded that, "The amount of taxable gain resulting from the sale of this property should be recomputed based upon a value of $382,797.80 for the land, plus the depreciated value of the buildings as of March 1, 1913."

On December 17, 1928, the said Board entered its final order of redetermination wherein it determined deficiencies against the [35] petitioners, Joseph O. Koepfli, Roland P. Bishop and William T. Bishop, for the year 1922 in the amounts of $3,890.38, $2,665.53 and $2,696.94, respectively.

As a basis for its order of redetermination, the Board of Tax Appeals adopted the following recomputation of the capital net gain resulting from the sale of the property which was the subject of the proceeding:

Sale Price of Real Estate		$476,179.90
March 1, 1913 value of land in accordance with the Board's decision	$382,797.80	
Depreciated value of buildings as reflected by 60 day letter (See Sched-		

ule 4–I, Pages 26 and 27 of Revenue Agent's Report dated January 31, 1924, covering investigation of Bishop & Company for years 1921 and 1922)	$ 72,036.54	454,834.34
Capital Net Gain		$ 21,345.56

The schedule in the agent's report mentioned in the above computation discloses the following method used in determining the value of the improvements:

Cost of Building in 1907	$ 89,914.35
1908 Improvements	5,543.73
1909 Improvements	21.92
Total cost prior to 3/1/1913	$ 95,480.00
Minus: Depreciation sustained to 3/1/1913. (No other evidence available)	10,207.80
Fair Market Value as of 3/1/1913	$ 85,272.20
Plus Improvements since 3/1/1913 to date of sale	2,699.88
TOTAL	$ 87,972.08
Minus Depreciation sustained and allowed upon the various examinations	17,167.83

Actual Net Cost of Bldg. 12/31/1921, (No Depreciation is claimed for 1922)		$70,804.25
Plus—Engine Room, built in 1907 and subject to 5% depreciation.		
[36] Brot. Forward		$ 70,804.25
Cost in 1907	$ 4,219.84	
Minus: Depreciation sustained to 3/1/1913	1,090.13	
Value as of 3/1/1913	3,129.71	
Subsequent Improvements	14.30	
TOTAL	3,144.01	
Minus Depreciation sustained and allowed upon various examinations	1,911.72	
Net cost as of 12/31/1921 (No depreciation claimed for 1922)		1,232.29
Total Net Cost of Bldgs.		$ 72,036.54

II.

DESIGNATION OF COURT OF REVIEW.

The petitioners being aggrieved by the opinion, decision and order of the United States Board of Tax Appeals and being residents of the city of Los

Angeles, State of California, desire a review thereof in accordance with the provisions of the Revenue Act of 1926 by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue to whom the said petitioners made their income and profits tax returns.

III.

ASSIGNMENT OF ERRORS.

The petitioners, as a basis for review, make the following assignment of error:

1. The Board of Tax Appeals erred in its conclusion of law that "the amount of taxable gain resulting from the sale of this property should be recomputed, based upon a value of $382,797.80 for the land plus the depreciated value of the buildings all as of March 1, 1913," in that the law does not require that cost of improvements erected prior to March 1, 1913, must be reduced by depreciation accrued to March 1, 1913, and the Board's conclusion should have been that the amount of taxable gain resulting from [37] the sale of this property should be recomputed based upon a value of $382,797.80 for the land plus the cost of the buildings, all as of March 1, 1913.

2. The Board of Tax Appeals, in its order of redetermination of the tax liability, erred in its computation of such tax liability for the reason that in computing profit on the sale of the 8th and Alameda Street property, said Board reduced the

basic cost of improvements on said property by depreciation accruing prior to March 1, 1913, and such reduction of cost by depreciation accruing prior to March 1, 1913, is contrary to law.

3. If the Board determined that the fair market value of the improvements (buildings) as of March 1, 1913, was represented by their depreciated cost on that date, then the Board erred in failing to compute the profit on the sale on the basis of cost of improvements rather than the March 1, 1913, value since the cost is greater than the March 1, 1913, value, and Sec. 202 (b) of the Revenue Act of 1921 in effect requires that the basis for ascertaining the profit on the sale of property acquired prior to March 1, 1913, is the cost of such property or its fair market value as of March 1, 1913, whichever is higher.

WHEREFORE, your petitioners pray that the decision of the Board of Tax Appeals entered herein against them be reviewed and modified by this Honorable Court and for such other and further relief as the Court may deem meet and proper in the premises.

JOSEPH O. KOEPFLI,
Petitioner.
ROLAND P. BISHOP,
Petitioner.
WILLIAM T. BISHOP,
Petitioner.
By CLAUDE I. PARKER,
Attorney.

PARKER and SMITH,
Attorneys for Petitioner,
808 Bank of America Bldg., Los Angeles, California.

[38] State of California,
County of Los Angeles,—ss.

Claude I. Parker, being duly sworn, deposes and says: That he is attorney for petitioners and he knows the contents of the foregoing petition and to the best of his knowledge and belief the statements therein are true and that the assignments of error are well taken and intended to be argued.

CLAUDE I. PARKER.

Subscribed and sworn to before me this 29th day of May, 1929.

[Seal] MARGUERITE LASAGE,
Notary Public in and for the County of Los Angeles, State of California.

Now August 9, 1929, the foregoing petition for review and proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[39] United States Board of Tax Appeals. Filed Jul. 24, 1929.

Before the United States Board of Tax Appeals.

DOCKET Nos. 14,006, 14,007 and 14,008.

JOSEPH O. KOEPFLI, ROLAND P. BISHOP, WILLIAM T. BISHOP,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above-stated case, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. Pleadings before the Board.
3. Findings of fact, opinion and decision of the Board.
4. Order of redetermination of the Board.
5. Petition for review.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the

United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 21, 1929.

CLAUDE I. PARKER,
B.,
Attorney for Petitioners.
PARKER and SMITH,
808 Bank of America Building, Los Angeles, California.

Of counsel:

FRANK G. BUTTS,
910–912 Investment Building, Washington, D. C.

Service accepted this 19th day of July, 1929.

C. M. CHAREST,
General Counsel.

Now August 9, 1929, the foregoing praecipe certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5955. United States Circuit Court of Appeals for the Ninth Circuit. Joseph O. Koepfli, Roland P. Bishop and William T. Bishop, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed September 20, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5955.

IN THE

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Joseph O. Koepfli, Roland P. Bishop and William T. Bishop,
Petitioners and Appellants,
vs.
Commissioner of Internal Revenue,
Respondent.

BRIEF FOR APPELLANTS.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Petitioners.

Of Counsel:
GEORGE H. KOSTER.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 5955.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Joseph O. Koepfli, Roland P. Bishop and William T. Bishop,
Petitioners and Appellants,
vs.
Commissioner of Internal Revenue,
Respondent.

BRIEF FOR APPELLANTS.

(All Italics Ours.)

INTRODUCTION.

This is an appeal by the petitioners, Joseph O. Koepfli, Roland P. Bishop and William T. Bishop, from a judgment entered in the United States Board of Tax Appeals, in favor of the respondent, the Commissioner of Internal Revenue.

STATEMENT OF THE CASE.

The three petitioners were for many years prior to 1922, and all during that year, partners in the firm of Bishop and Company. Each owned a one-third interest.

In 1905 they purchased a tract of 6.24 acres of land lying along 8th street, between Alameda and Lawrence streets, in the city of Los Angeles, California. The purchase price was $94,610.74. In 1907 they put up a concrete building on the property at a cost of $94,134.19. In 1908 and 1909 other improvements were erected amounting to $5,543.73 and $21.92, respectively. The land and buildings were sold by the petitioners in 1922 for $500,000.00, the net to petitioners being $476,179.90.

The petitioners contended that the March 1, 1913 value of the property sold by them in 1922 was $466,132.27 and that the net taxable gain was only $10,047.63. The respondent determined the March 1, 1913 value to be $345,463.54, resulting in a net taxable gain of $152,901.39, or $50,967.13 to each partner.

The petitioners appealed the Commissioner's determination to the United States Board of Tax Appeals. The cases, being consolidated for trial, were heard by the board in Los Angeles, California, on April 11th and 12th, 1928. Under date of October 4th, 1928, the said board rendered its findings of fact in accordance with the facts hereinabove alleged, further finding, however, that the fair market value of the land as of March 1, 1913, was $382,797.80 and that the value of the buildings was the value as determined by the respondent, viz., the depreciated cost of the buildings as of March 1, 1913. The said board on the said date also rendered its opinion in which it concluded that, "The amount of taxable gain resulting from the sale of this property should be recomputed based upon a value of $382,797.80 for the land, plus the depreciated value of the buildings, all as of March 1, 1913."

On December 17, 1928, the said Board entered its final order of redetermination wherein it determined deficiencies against the petitioners, Joseph O. Koepfli, Roland P. Bishop and William T. Bishop, for the year 1922 in the amounts of $3,890.38, $2,665.53 and $2,696.94, respectively. From this order appeal is taken to this Honorable Court.

QUESTION INVOLVED.

The question involved in this appeal is solely a question of law which may be succinctly stated as follows:

In determining the gain in 1922 on the sale of property acquired prior to March 1, 1913, when the basis is cost or March 1, 1913, value, whichever is the higher, is it required under section 202(b) of the Revenue Act of 1921 that the cost basis be reduced by depreciation accrued or sustained prior to March 1, 1913?

ASSIGNMENT OF ERRORS.

In raising the above question, there was set forth the following assignments of error as grounds for this appeal:

1. The Board of Tax Appeals erred in its conclusion of law that "the amount of taxable gain resulting from the sale of this property should be recomputed, based upon a value of $382,797.80 for the land plus the depreciated value of the buildings all as of March 1, 1913", in that the law does not require that cost of improvements erected prior to March 1, 1913, must be reduced by depreciation accrued to March 1, 1913, and the Board's conclusion should have been that the amount of taxable gain resulting from the sale of this property should be recomputed

based upon a value of $382,797.80 for the land plus the cost of the buildings, all as of March 1, 1913.

2. The Board of Tax Appeals, in its order of redetermination of the tax liability, erred in its computation of such tax liability for the reason that in computing profit on the sale of the 8th and Alameda street property, said Board reduced the basic cost of improvements on said property by depreciation accruing prior to March 1, 1913, and such reduction of cost by depreciation accruing prior to March 1, 1913, is contrary to law.

3. If the Board determined that the fair market value of the improvements (buildings) as of March 1, 1913. was represented by their depreciated cost on that date, then the Board erred in failing to compute the profit on the sale on the basis of cost of improvements rather than the March 1, 1913, value since the cost is greater than the March 1, 1913, value, and Sec. 202(b) of the Revenue Act of 1921 in effect requires that the basis for ascertaining the profit on the sale of property acquired prior to March 1, 1913, is the cost of such property or its fair market value as of March 1, 1913, whichever is higher.

STATUTES.

This case, concerning income taxes for the year 1922, is directly controlled by the provisions of the Revenue Act of 1921, but since later acts will be referred to in the argument, pertinent provisions thereof are quoted in this section of this brief for reference purposes.

Revenue Act of 1921.

> "Section 202(a). That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed,

acquired after February 28, 1913, shall be the cost of such property; * * *

"(b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but

(1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value."

Revenue Act of 1924:

"Section 202(a). Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

"(b) In computing the amount of gain or loss under subdivision (a) proper adjustment shall be made for (1) any expenditure properly chargeable to capital account and (2) *any item of loss, exhaustion, wear and tear, obsolescence, amortization, or depletion, previously allowed with respect to such property.*

"Section 204(b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property * * * or (B) the fair market value of such property as of March 1, 1913, whichever is greater."

Revenue Act of 1926.

Section 202(a)—Same as section 202(a) of the Revenue Act of 1924:

"(b) In computing the amount of gain or loss under subdivision (a) * * * (2) The basis shall

be diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization and depletion which have since the acquisition of the property been allowable in respect of such property under this act or prior income tax laws; * * * *In addition, if the property was acquired before March 1, 1913, the basis (if other than the fair market value as of March 1, 1913) shall be diminished in the amount of exhaustion, wear and tear, obsolescence, and depletion actually sustained before such date.*"

Section 204(b)—Same as section 204(b) of the Revenue Act of 1924.

Comments on History of Sections of the Revenue Acts Relating to Basis for Determining Gain or Loss on Sale of Property.

(a) In General.

The Revenue Act of 1913 and all subsequent acts have provided for an annual deduction from gross income for depreciation, but not until the Revenue Act of 1924 was there any expressed statutory requirement that depreciation be considered in the computation of the gain or loss resulting from the sale or other disposition of depreciable property. Prior to the passage of the 1924 Act, the authority for such consideration was found only in the Commissioner's regulations and the decisions of the Bureau of Internal Revenue. The Revenue Act of 1921 contained no provision with reference to the use of depreciation in the computation of gain or loss. The Revenue Act of 1924 added the provision that the basis should be diminished in the amount of exhaustion, wear and tear, obsolescence and depletion "previously allowed with respect to such property". The Revenue Act of 1926 revised the 1924 addition by providing that the basis should be dimin-

ished in the amount of exhaustion, wear and tear, obsolescence and depletion "which have since the acquisition of the property *been allowable* under this act or prior income tax laws", and it further added another and new provision that "if the property was acquired before March 1, 1913, the basis * * * shall be diminished in the amount of exhaustion * * * sustained before such date".

The Revenue Act of 1924 was the first to make mention of adjustments to be made for depreciation and then only with regard to depreciation after 1913 since depreciation after 1913 was the only depreciation within the category of depreciation "previously allowed". It will undoubtedly be admitted that under this provision, if the taxpayer took no depreciation and if none was allowed, in the income tax returns filed by that taxpayer from 1913 to date of sale, the basis for determining gain on the sale would not be reduced by depreciation accruing from 1913 to the date of sale. Supposing the basis was cost in such a case—would it be at all consistent to say that the basis would have to be reduced by depreciation accruing prior to 1913, but not by depreciation accruing subsequent to 1913? There was no depreciation "allowed" prior to 1913 since there was no income tax law in existence at that time. There is therefore no provision in either the 1921 or 1924 Revenue Acts specifically requiring the basis to be diminished by depreciation sustained or accrued prior to March 1, 1913.

(b) Revenue Act of 1926.

The Revenue Act of 1926 went beyond the requirements of the 1924 Act. It required that the basis be reduced by depreciation which since the date of acquisition of the

property has been "allowable" under the various Revenue Acts. Then, recognizing that this would not cover the situation prior to 1913 when no income tax acts were in effect, the 1926 Act contained an additional and new provision to the effect that if the property was acquired prior to March 1, 1913, the cost basis would have to be reduced by the depreciation actually sustained before March 1, 1913. The fact that this new provision was inspired by the recognition that the provisions of the previous acts were not sufficient may readily be appreciated from the reference in the report of the Ways and Means Committee to the House of Representatives to this new provision, which stated as follows:

> "When property is acquired prior to March 1, 1913, the present law provides that in the case of a sale of such property the basis for determining gain or loss shall be cost or March 1, 1913, value, whichever is higher; and also provides that in making adjustments for depreciation, etc., proper adjustment shall be made for depreciation, etc., 'previously allowed'. Owing to the fact that there was no income tax prior to March 1, 1913, in cases where property was acquired prior to that date no depreciation has been 'allowed', and the taxpayer may receive too large a basis for determining gain or loss. The amendment proposed provides that the deductions for depreciation, etc., to be made in such cases shall be such deductions as were actually sustained with respect to such property, which would include such depreciation as had occurred prior to that date."

The report of the Senate Finance Committee to the Senate contained the same statement as above quoted.

(c) Revenue Act of 1924.

Since the Revenue Act of 1924 was the first to mention the use of depreciation as affecting the basis, it is interest-

ing to note, particularly in comparison with the Committee Reports above quoted with reference to the 1926 Revenue Act the Committee Reports concerning the gain or loss from sale provisions of the 1924 Act. This language is found in House Report 179, the report of the Committee on Ways and Means to the House, February 11, 1924:

> "Section 202. There is no provision of the existing law which corresponds to this section of the bill. The purpose in embodying in the law this section is to show clearly the method of determining the amount of gain or loss from the sale or other disposition of property * * *.
>
> "(2) There is no provision in the existing law which corresponds to subdivision (b), but the rule laid down therein is substantially the same as the construction placed upon the existing law by the Treasury Department. It provides that in computing gain or loss from the sale or other disposition of property the cost or other basis of the property (and in the appropriate case the fair market value as of March 1, 1913) shall be increased by the amount of items properly chargeable to capital account and decreased by the depreciation and similar deductions allowed with respect to the property. Under this provision * * * *items such as depreciation and obsolescence previously allowed* with respect to the property *are to be subtracted from the cost* of the property in determining the gain or loss from its subsequent sale."

The Senate Finance Committee Report contains practically the same language.

There is no ambiguity in the above quotation which is an expression of the intention of Congress as to the meaning of the particular section of the law being explained. It states clearly that the provision as to the consideration of depreciation as a reduction of the basis is a new provision; that items such as depreciation and obsolescence

previously allowed with respect to the property (and in the 1926 Act, *previously allowable* with respect to the property) are to be *subtracted from the cost* of the property in determining the gain or loss from its subsequent sale. It does not provide that the cost shall be reduced by depreciation sustained from date of acquisition; nor does it provide that the basis shall be cost depreciated to March 1, 1913; it merely provides that the basis, whether *cost* or March 1, 1913, value, shall be reduced by the depreciation previously allowed under prior Revenue Acts. It is very significant that in the Committee Reports on the 1926 Revenue Act it is recognized that "owing to the fact that there was no income tax prior to March 1, 1913, in cases where property was acquired prior to that date no depreciation has been 'allowed' * * * the *amendment* proposed provides that the deductions for depreciation to be made in such cases shall be such deductions as were actually sustained with respect to such property, which would include such depreciation as had occurred prior to that date". The "amendment" referred to is the brand new provision of section 202(b)(2) of the Revenue Act of 1926 which has hereinbefore been quoted. (*Supra,* pp. 7-8.)

(d) Revenue Act of 1921.

In setting out the foregoing comments concerning the Revenue Acts of 1924 and 1926, it has not been overlooked that the instant case is controlled by the Revenue Act of 1921. In fact, the consideration given to the subsequent acts is pertinent and essential to the determination of the proper interpretation of the 1921 Revenue Act, particularly as to the question involved.

Section 202 (a) of the Revenue Act of 1918 contained the brief provision that in the case of sale of property the basis for determining gain or loss shall be:

> "(1) In the case of property acquired before March 1, 1913, the fair market price of value of such property as of that date; and
>
> "(2) In the case of property acquired on or after that date, the cost thereof; * * * "

The report of the Ways and Means Committee to the House (H. R. 350, Aug. 16, 1921), relating to the provisions of section 202 of the Revenue Act of 1921 stated:

> "In the case of property acquired before March 1, 1913, under existing law, the basis for determining gain or loss is the fair market price of such property as of that date. The decision of the Supreme Court in the case of Merchants Loan & Trust Co. v. Smietanka (decided March 38, 1921) makes necessary not a fundamental modification of that rule but a more detailed statement of its application.
>
> "The proposed bill gives explicit effect to the doctrine approved in that decision; provides that the general basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property shall be the cost of such property; but that in the case of property acquired before March 1, 1913, (1) if its fair market price or value as of March 1, 1913, is in excess of the cost, the gain to be included in the gross income shall be the excess of the amount realized therefor over the fair market price as of March 1, 1913; (2) if its fair market value as of March 1, 1913, is lower than cost, the deductible loss shall be the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; and (3) if the amount realized therefor is more than cost but less than its fair market price or value as of March 1, 1913, or less than cost but more than such fair market price or value, no gain or loss shall be recognized."

In the Finance Committee Report [S. Rep. 275, Sept. 26, 1921] to the Senate regarding the same section, the following appears:

> "Section 202 provides in detailed form for the basis (used in case of sale * * * of property) for determining gain or loss. Because of the decisions of the Supreme Court in the case of Goodrich v. Edwards and Walsh v. Brewster (decided March 28, 1921) it is necessary to state explicitly in the statute, the method of treating gain or loss accrued prior to March 1, 1913. Heretofore property held on March 1, 1913, has been considered capital as of its value on that date. The concession of the Solicitor General in the above cases, adopted by the court, is to the effect that gain or loss in every case is determined upon the basis of cost or acquisition value and not by the March 1, 1913 value of the property, the gain or loss accruing before March 1, 1913, however, being excluded for purposes of computing the net income subject to tax."

Then follows the same explanation of the revised section as appears in the Ways & Means Committee Report.

The Supreme Court cases mentioned in the above reports and which will forthwith be examined, contain absolutely no statement by which it could be inferred that the court was construing the section in any manner as requiring the basis to be reduced by depreciation accrued prior to March 1, 1913.

Merchants' Loan & Trust Co. v. Smietanka (255 U. S. 509) held that the term "income" comprehended appreciation in the value of a capital asset, and that when such appreciation was realized it could be taxed as "Income" under the Sixteenth Amendment to the Constitution. This case was considered under the Revenue Act of 1916, which however was held in *U. S. v. Flannery,* 268 U. S. 98, to be

of the same effect insofar as the sections concerning basis for determining gain or loss are concerned, as the Revenue Act of 1918.

Goodrich v. Edwards, 255 U. S. 527;
Walsh v. Brewster, 255 U. S. 536;
Lucas v. Alexander, 279 U. S. 573;
Involving sales of stock under the Revenue Act of 1916.

The Supreme Court has held that where the transaction shows an *actual gain* and the March 1, 1913, value is less than the cost, the *taxable gain* is ascertained by subtracting the cost from the selling price (holding as to second transaction in *Walsh v. Brewster, supra*); and that where there is an *actual gain*, and the March 1, 1913 value is greater than the cost, the *taxable gain* is ascertained by subtracting the March 1, 1913 value from the selling price (holding as to first transaction in *Goodrich v. Edwards, supra;* and in the single transaction involved in *Lucas v. Alexander, supra*).

U. S. v. Flannery, 268 U. S. 98;
McCaughn v. Ludington, 268 U. S. 106;
Involving sales of stock under 1918 Revenue Act.
Heiner v. Tindle, 276 U. S. 582.
Involving sale of house under 1918 Revenue Act.

In *U. S. v. Flannery, supra,* the taxpayer undertook to deduct as a loss the difference between the sale price and the March 1, 1913 value. This was disallowed, for the reason that the sales price showed a gain over the cost, and the court held that, as there was no actual loss, there was no deductible one. But in cases where the transaction involved disclosed an actual loss and that the March 1, 1913

value was greater than the cost, it has been held that the deductible loss is ascertained by subtracting the sale price from the cost. This was the conclusion as to the transaction involved in *McCaughn v. Ludington, supra,* where there was an actual loss, and the March 1, 1913 value was greater than the cost. And the same proposition was affirmed in the case of *Heiner v. Tindle, supra.*

In *Heiner v. Tindle, supra,* the property involved was a dwelling house. It was purchased in 1892 at a cost of $172,000.00. In 1901 the taxpayer ceased to use it as a residence, and on October 1, 1901, devoted it exclusively to the production of taxable income in the form of rentals, a transaction for profit. He continued to lease it until 1920, when it was sold for $73,000.00. The fair market value of the property on March 1, 1913, was $120,000.00. Its value on October 1, 1901, when it was exclusively devoted to the production of income, was not found. In his tax return for 1920, the taxpayer deducted as a loss $47,000.00, the difference between the March 1, 1913, value ($120,000.00) and the sales price ($73,000.00). The Commissioner disallowed the deduction and assessed an additional tax upon the $47,000.00. The tax was paid and suit was brought. The District Court sustained the collector in disallowing the deduction. The Circuit Court of Appeals reversed the District Court. The Supreme Court reversed the judgment of the Circuit Court of Appeals and remanded the case for a new trial so that the value of the property on October 1, 1901, when rented, may be found, with the instruction that "if that value is larger than the value as of March 1, 1913, the deduction made below should be allowed; *if less, only the difference,* if any, *between its then value and the sales price should be allowed.*"

The last case is probably of more direct interest than the others since it alone concerns the basis to be used in the case of the sale of depreciable property. Still, no analysis of this case can disclose any requirement that cost be reduced by depreciation accrued prior to March 1, 1913. On the contrary, remembering that in that case cost was the 1901 value, the court specifically stated that "if that value is larger than the value as of March 1, 1913, the deduction made below should be allowed; if less, only the difference, if any, between its then value and the sales price should be allowed." *Nothing said about depreciating such value to March 1, 1913.*

And in the other cases cited above, nowhere is there mention of reducing cost by depreciation accrued or sustained prior to March 1, 1913.

These cases are mentioned because, as explained by the Legislature, the Revenue Act was amended to comply with the decisions of those cases, and since those decisions made no rule requiring the reduction for depreciation, the amendment which did not specifically make such requirement cannot be construed to impliedly contain such a requirement. As an example of the general language used in all these cases the following quotation is taken from the case of *U. S. v. Flannery, supra:*

> "These decisions" (referring to *Walsh v. Brewster* and *Goodrich v. Edwards*) "are equally applicable to the Act of 1918, * * * As it was held in these decisions that the Act of 1916 imposed a tax to the extent only that gains were derived from the sale, and that the provision as to the market value of the property on March 1, 1913, was applicable only where a gain had been realized *over the original capital investment,* so we think it should be held that the Act of 1918 imposed a tax and allowed a deduction to the

extent only that an actual gain was derived or an actual loss sustained *from the investment,* and that the provision in reference to the market value on March 1, 1913, was applicable only where there was such an actual gain or loss; that is, that this provision was merely a limitation upon the amount of the actual gain or loss which would otherwise have been taxable or deductible."

ARGUMENT.

Section 202 (b) of the Revenue Act of 1921 Must be Interpreted in the Ordinary Meaning of Its Terms. The Term "Cost" Does Not Mean "Cost Less Depreciation Sustained Prior to March 1, 1913."

The sole question involved is whether in determining the cost basis in computing the gain on the sale of depreciable property, the cost should be reduced by depreciation accruing from date of acquisition to March 1, 1913.

As will be noted from schedules appearing on pages 52-53 of the Transcript of Record, the amount of the accrued depreciation prior to March 1, 1913 and deducted from cost, was $11,297.93 ($10,207.80 on the main building and $1,090.13 on the engine room). Petitioners contend that actual cost, without reduction for this depreciation, should have been used as the basis for determining gain, thus reducing by $11,297.93 the taxable profit computed by the Board as having been realized upon the sale of the property during the year 1922.

As has been stated, section 202 of the Revenue Act of 1921 provides that the basis in determining gain on the sale of property acquired prior to March 1, 1913 is the *cost* of such property or the fair market value of such property as of March 1, 1913, whichever is higher. For purposes of this case the question of March 1, 1913 value can be

eliminated since the taxpayer failed to prove a March 1, 1913 value and since such value is allowed solely for the purpose of limiting the *actual gain* to that portion of it which accrued subsequent to March 1, 1913. (*U. S. v. Flannery, supra.*)

The question, further reduced, resolves itself into this—is the term "cost" as used in the Revenue Act to be construed as "original capital investment" or "cost," or is it to be construed as "original cost less depreciation" sustained prior to March 1, 1913? The very statement of the question seems to answer it. The courts cannot add something to the law which does not appear there. Certainly then, should the court construe the term "cost" as "cost less depreciation," is it not adding something to the law? Is it not adding words, "less depreciation," which are not included in the ordinary definition of the term "cost," and which add a provision and meaning to the law which does not appear in the law? Is it not in effect an act of legislating by the court? (*U. S. v. Watt,* 1 Bond 580.) It has been shown that Congress had occasion to review very carefully these sections of the Revenue Act and it must be concluded that Congress by reason of its careful consideration of these sections, chose its terms with great care and purpose and intended the terms to be applied according to their ordinary meaning. It is not within the power of the court, therefore, to modify or enlarge the meanings of those terms to justify a violation of those terms. (*Smietanka v. First Trust & Savings Bank,* 257 U. S. 602; *Treat v. White,* 181 U. S. 264; *U. S. v. Field,* 255 U. S. 257; *Gould v. Gould,* 245 U. S. 151.) The terms of the 1926 Revenue Act may not be applied to cover the omission in the earlier acts. (*Smietanka v. First Trust*

& Savings Bank, supra.) As stated in the committee reports hereinbefore quoted, the provision in the 1926 Act, section 202(b) regarding the consideration of depreciation accrued prior to March 1, 1913, was an *amendment* of the previous acts and not a construction of those acts.

It is admitted that departmental regulations required the reduction of the basis by depreciation sustained prior to March 1, 1913, but it has frequently been held that the courts will give no effect to departmental regulations where such regulations are in conflict with express statutory provision (*U. S. v. Grimaud,* 220 U. S. 506; *U. S. v. Birdsal,* 233 U. S. 223; *U. S. v. Smull,* 236 U. S. 405; *U. S. v. Morehead,* 243 U. S. 607), or where the statute is not ambiguous (*Swift & Co. v. U. S.,* 105 U. S. 691; *U. S. v. Tanner,* 147 U. S. 661; *U. S. v. Alger,* 152 U. S. 384). The Commissioner of Internal Revenue cannot by his rulings and regulations increase the measure of the tax imposed by the statute (*Clicquot Club Co. v. U. S.,* 13 Fed. (2d) 655). The policy of the courts in this regard is defined in the case of *Gould v. Gould, supra,* as

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen."

See also:

U. S. v. Coulby, 251 Fed. 982;

U. S. v. Wigglesworth, 2 Story 369;

American Net & Twine Co. v. Worthington, 141 U. S. 468;

Benziger v. U. S., 192 U. S. 38;

Schwab v. Doyle, 258 U. S. 529.

As stated by the Supreme Court in the case of *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364:

> "And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

U. S. v. Ludey, 272 U. S. 295, distinguished

(a) THE DECISION THAT "COST" IS CONSTRUED AS MEANING "COST LESS DEPRECIATION ALLOWABLE AFTER MARCH 1, 1913" CANNOT JUSTIFY A CONCLUSION THAT COST MAY BE CONSTRUED AS COST LESS DEPRECIATION SUSTAINED BEFORE MARCH 1, 1913.

It is true that in the case of *U. S. v. Ludey*, 274 U. S. 295, which will hereinafter be discussed, the Supreme Court introduced a meaning to section 202 of the Revenue Act of 1918 which does not appear in the exact wording of the statute, but, as will hereinafter be pointed out, such interpretation was justified under the well established rule that statutes should receive a sensible construction to avoid an unjust or absurd conclusion (*In re Chapman*, 166 U. S. 661).

The Ludey case did not, however, hold that the cost basis for determining gain or loss should be reduced by depreciation *sustained prior to March 1, 1913.* It merely held that the basis, whether cost or March 1, 1913 value, should be reduced by depreciation sustained *subsequent to March 1, 1913, and allowable* under the Revenue Acts. The reasoning upon which this holding is based justifies it as a sensible and reasonable construction of the statute, but the same reasoning can not apply as grounds for holding that depreciation prior to March 1, 1913, should be deducted from the cost basis, since the facts can not support

such reasoning, and when the reasoning falls the conclusion based upon such reasoning must likewise fall.

The Ludey case involved a situation where the taxpayer held on March 1, 1913 certain assets which were acquired prior to that date, the value of which on March 1, 1913, was in excess of the original cost. The assets were sold in 1917 at a price which exceeded the March 1, 1913, value less depreciation and depletion from March 1, 1913, to date of sale. The taxpayer contended that the March 1, 1913, basis should not be reduced by depreciation and depletion sustained from that date to the date of sale, in determining the gain derived from the sale. With respect to this contention the court held:

> "Congress doubtless intended that the deduction to be made from the original cost should be the aggregate amount which the taxpayer was entitled to deduct in the several years."

As to the meaning of "cost" as used in the opinion, the following footnote appears in the opinion:

> "Some of the properties were purchased before March 1, 1913. As to these the term cost is used, throughout the opinion, as meaning their value as of March 1, 1913, that value being higher than the original costs."

This footnote was not a restriction of the rule announced by the case but merely an explanation of the application of the term "cost" to the statement of facts in the case. If the facts had disclosed the original cost to be greater than the March 1, 1913 value, this particular footnote would have been unnecessary. It should also be noted that all other footnotes to the opinion in the case refer to the regulations and statutes concerning the depreciation allowable under the various Revenue Acts.

(b) The Ludey Decision Was Reasonable in That It so Construed the Term "Cost" as to Effect a Fair Result From a Tax Viewpoint.

Let us note the language used in the Ludey case:

> *"The depreciation charge permitted as a deduction from the gross income* in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. *The amount of the allowance for depreciation* is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sum set aside will (with the salvage value) suffice to provide an amount equal to the original cost. *The theory underlying this allowance for depreciation* is that by using up the plant a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold. When the plant is disposed of after years of use, the thing then sold is not the whole thing originally acquired. The amount of the depreciation must be deducted from the original cost of the whole in order to determine the cost of that disposed of in the final sale of properties. *Any other construction would permit a double deduction for the loss of the same capital assets."*
>
> * * * * * * * * *
>
> *"The depletion charge permitted as a deduction* from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. The reserves are recognized as wasting assets."
>
> * * * * * * * * *
>
> *"The corporation tax law of 1909 had failed to provide for any deduction on account of the depletion of mineral reserves.* (Stratton's Independence v. Howbert, 231 U. S. 399; von Baumbach v. Sargent Land Co., 242 U. S. 503; United States v. Biwabik Mining Co., 247 U. S. 116; Goldfield Consolidated Mines Co.

v. Scott, 247 U. S. 126.) *The resulting hardship to operators of mines induced Congress to make provision in the revenue law of 1913 and all later Acts for some deduction on account of depletion* in determining the amount of the taxable income from mines. It is not lightly to be assumed that Congress intended the fact to be ignored in determining whether there was a loss or a gain on a sale of the mining properties."

* * * * * * * * *

"The Court of Claims erred in holding that no deduction should be made from the original cost on account of depreciation and depletion; but it does not follow that the amount deducted by the Commissioner was the correct one. The aggregate for depreciation and depletion claimed by Ludey in the income tax returns for the years 1913, 1914, 1915, and 1916, and allowed, was only $5,156. He insists that more can not be deducted from the original cost in making the return for 1917. The contention is unsound. The amount of the gain on the sale is not dependent on the amount claimed in earlier years. If in any year he has failed to claim, or has been denied, the amount to which he was entitled, rectification of the error must be sought through a review of the action of the Bureau for that year. He can not choose the year in which he will take a reduction. *On the other hand, we can not accept the Government's contention that the full amount of depreciation and depletion sustained, whether allowable by law as a deduction from gross income in past years or not, must be deducted from cost in ascertaining gain or loss. Congress doubtless intended that the deduction to be made from the original cost should be the aggregate amount which the taxpayer was entitled to deduct in the several years.*"

It is obvious from these quotations that the court was considering exclusively the reduction of the basis by depreciation allowable under the Revenue Acts. After stating that the "theory underlying this *allowance* for depreciation is that by using up the plant a gradual sale is made

of it," the court finds that such depreciation deductions should reduce the basis since "any other construction *would permit a double deduction* for the loss of the same capital asset." As previously stated the law favors a reasonable and sensible construction of a statute and this court's interpretation is therefore justified since any other construction would have permitted a double deduction, admittedly an unreasonable and unfair result. But such would not be the case with respect to depreciation sustained prior to March 1, 1913. As previously stated there is nothing in the decision in the Ludey case from which there might be drawn an inference that the court was laying down a rule that depreciation sustained before March 1, 1913, must be used as a reduction of the cost basis. That question was not before it. The court in a footnote refers to the decision of the U. S. Board of Tax Appeals in the case of *Even Realty Co.*, 1 B. T. A. 355, but it gave no expression of approval of the decision in that case. The Even Realty Co. case decided that both depreciation sustained after March 1, 1913, and depreciation sustained prior to March 1, 1913, should be used to reduce the cost basis. It is noteworthy, however, that in a later case decided after the Ludey case, in which the Board of Tax Appeals followed the ruling in the Even Realty Co. case, *seven members of the board expressed their dissent in that part of the decision requiring the cost basis to be decreased by depreciation sustained prior to March 1, 1913.* (*Noaker Ice Cream Co. v. Commissioner,* 9 B. T. A. 1100.)

A Reasonable Construction of Section 202 (b) of the Revenue Act of 1921 Would Not Require the Reduction of the Cost Basis by Depreciation Sustained Prior to March 1, 1913.

The question involved must be considered from a tax viewpoint rather than an accounting viewpoint. There is at issue in this case the interpretation of a taxing statute, which if construed strictly and literally supports the petitioners' contention. The statute states that the basis for determining the gain from the sale of property acquired before March 1, 1913, is the "cost" of such property (eliminating the provision concerning March 1, 1913, value since, under the facts, it is not a factor in this case). The term "cost" has but one literal and strict meaning. That meaning is the meaning the courts should give to it unless such an unreasonable result should follow that the modification of that meaning would be justified. As previously explained, the court for that reason, in the Ludey case, modified the meaning to allow consideration of depreciation sustained after March 1, 1913. But no unreasonable result occurs from that modified meaning if it is interpreted as ruling that no reduction is to be made for depreciation sustained before March 1, 1913. From a tax viewpoint, there exists no reason for further modifying or enlarging the terms of the statute, and since the result secured from the application of the term "cost," even as modified by the Ludey case, in its strict sense so as to prevent reduction of cost basis by depreciation sustained before March 1, 1913, is reasonable, fair and sensible, the court is enjoined to give it the interpretation which the ordinary meaning of the terms impart.

It was from a tax viewpoint that the Supreme Court decided the Ludey case, for its decision was based primarily on no other reason than that any other construction of the Revenue Act would permit the taxpayer a double deduction (*supra*, p. 23.) The court further stated, "On the other hand, we *cannot accept* the Government's contention *that the full amount of depreciation* and depletion *sustained, whether allowable by law as a deduction* from gross income in past years or not, *must be deducted from cost* in ascertaining gain or loss." Except that from a tax viewpoint the government's contention was not fair, why could not the court accept that contention? The court continues, "Congress doubtless intended that the deduction to be made from the original cost should be the aggregate amount which the taxpayer *was entitled to deduct* in the several years."

For taxation purposes deductions from gross income for depreciation and depletion are allowable only to the extent for which Congress has made provision by specific enactment. In the Corporation Tax Law of 1909 no provision was made for the deduction for depletion, hence none was allowable. (*Stratton's Independence v. Howbert*, 231 U. S. 399; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503; *United States v. Biwabik Mining Co.*, 247 U. S. 116; *Goldfield Consolidated Mines Co. v. Scott*, 247 U. S. 126.) In subsequent Revenue Acts provision was made for deductions for depletion in certain limited amounts. Under the Ludey case the cost basis could not be reduced by depletion sustained in 1909, 1910, 1911 and 1912 since none was allowable under the Excise Tax Act of 1909, and could be reduced by depletion for subsequent years not in amounts actually sustained but only in such limited amounts as

were allowable as deductions from gross income under the respective Revenue Acts. Is it not therefore an absurd and unfair conclusion to hold that the basis must be reduced by the full amount of depletion sustained from the date of acquisition to 1909, particularly when the specific provision of the Revenue Act does not by its terms require such an adjustment?

Conclusion.

The petitioners respectfully urge that Section 202(b) of the Revenue Act of 1921 specifically prescribes that where cost is greater than March 1, 1913 value of property acquired prior to and sold after that date, the basis for determining *gain* from the sale is the *cost* of such property; that to construe the term cost in any but its ordinary meaning or to particularly construe it as meaning cost less depreciation sustained prior to March 1, 1913, is unjust and unreasonable, leading to absurd and unfair results, and therefore not a construction which the courts are permitted to give to a clear and unambiguous provision of a statute; and therefore the Board of Tax Appeals erred in reducing the cost basis by depreciation sustained prior to March 1, 1913. Petitioners pray that the Honorable Court sustain their contention and eliminate from the taxable profit realized in 1922 on the sale of property as determined by the board, the amount of $11,297.93 which is the amount of the depreciation sustained prior to March 1, 1913 and subtracted from the cost by the Board in determining the gain from the sale.

Respectfully submitted,

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No. 5955

In the United States Circuit Court of Appeals for the Ninth Circuit

JOSEPH O. KOEPFLI, ROLAND P. BISHOP AND WILLIAM T. BISHOP, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5955

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v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

PREVIOUS OPINION

The only previous opinion in the present case is that of the United States Board of Tax Appeals (R. 40–42), which is reported in 13 B. T. A. 784.

JURISDICTION

The petition for review involves income taxes for the year 1922 and is taken from orders of redetermination of the United States Board of Tax Appeals entered on December 17, 1928. (R. 42–45.) This case is brought to this court by petition for

review filed June 17, 1929 (R. 47–56), pursuant to Sections 1001, 1002, and 1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110.

QUESTION PRESENTED

In determining the gain in 1922 on the sale of property acquired prior to March 1, 1913, when the basis is cost or March 1, 1913, value, whichever is greater, is it required under Section 202 (b) of the Revenue Act of 1921 that the cost basis be reduced by depreciation accrued or sustained prior to March 1, 1913?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; * * *.
>
> (b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but
>
> (1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value; * * *.

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Regulations 62, Treasury Department:

ART. 1561. *Basis for determining gain or loss from sale.*—For the purpose of ascertaining the gain or loss from the sale or exchange of property, the basis is the cost of such property, or in the case of property which should be included in the inventory, its latest inventory value. But in the case of property acquired before March 1, 1913, when its fair market value as of that date is in excess of its cost, the gain to be included in gross income is the excess of the amount realized therefor over such fair market value. Also in the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor. No

gain or loss is recognized in the case of property sold or exchanged (a) at more than cost but at less than its fair market value as of March 1, 1913, or (b) at less than cost but at more than its fair market value as of March 1, 1913. In any case proper adjustment must be made in computing gain or loss from the exchange or sale of property for any depreciation or depletion sustained and allowable as a deduction in computing net income; the amount of depreciation previously charged off by the taxpayer shall be deemed to be the true depreciation sustained unless shown by clear and convincing evidence to be incorrect. * * *

STATEMENT OF FACTS

The Board of Tax Appeals made the following findings of fact which are not in dispute (R. 39–40):

The three petitioners were for many years prior to 1922, and all during that year, partners in the firm of Bishop and Company. Each owned a one-third interest. In 1905 they purchased a tract of 6.24 acres of land lying along 8th Street, between Alameda and Lawrence Streets, in the city of Los Angeles, California. The purchase price was $94,-610.74. In 1907 they put up a concrete building on the property at a cost of $94,134.19. In 1908 and 1909 other improvements were erected amounting to $5,543.73 and $21.92, respectively. The land and buildings were sold by the petitioners in 1922

for $500,000, the net to petitioners being $476,-179.90. Spur lines from two railroads ran to this land and it was the only available tract of any considerable size suitable for manufacturing purposes, and "close in" to the then business center of the city. At the time of its purchase and for some years thereafter, proximity to the business center was very desirable in a manufacturing site. The original purchase price in 1905 was approximately the fair value of the land, and by March 1, 1913, its value without improvements was $382,797.80. There is no evidence regarding the amount of depreciation upon the buildings.

About the year 1915 the real-estate market in Los Angeles went into a bad slump, and no recovery took place for five or six years. By 1922, however, the market had recovered at least its status of March 1, 1913, and by 1923 it reached its peak. But by that time large industrial sites "close in" were not in much demand, as factories had gone farther out to get cheaper land.

The contention of the petitioners is that the March 1, 1913, value of the property sold by them in 1922 was $466,132.27, and that the net taxable gain was only $10,047.63. The respondent determined the March 1, 1913, value to be $345,463.54, resulting in a net taxable gain of $152,901.39, or $50,967.13 to each partner. No other questions were presented.

The Board in its opinion held that the fair market value of the land as of March 1, 1913, was $382,797.80, and that the value of the buildings was the value as determined by the Commissioner, namely, the depreciated cost of the buildings as of March 1, 1913, and that the amount of taxable gain resulting from the sale of this property should be recomputed, based upon a value of $382,797.80 for the land, plus the depreciated value of the buildings as of March 1, 1913. (R. 41–42.)

On December 17, 1928, the Board entered its final orders of redetermination, computed as aforesaid, wherein it determined deficiencies against the petitioners, Joseph O. Koepfli, Roland P. Bishop, and William T. Bishop for the year 1922 in the amounts of $3,890.38, $2,665.53, and $2,696.94, respectively. The petitioners do not assign an error as to the March 1, 1913, value of the land, but only allege error on account of the reduction of the basis by depreciation accrued prior to March 1, 1913, amounting to $11,297.93. (R. 54–55.)

SUMMARY OF ARGUMENT

An adjustment of the cost basis of determining the gain from the sale of property acquired prior to March 1, 1913, may be required without any specific provision therefor in Section 202 (b) of the Revenue Act of 1921. In *United States* v. *Ludey,* 174 U. S. 295, it was recognized that depreciation sustained subsequent to March 1, 1913,

should be subtracted from the March 1, 1913, value of property which under the Revenue Act of 1916 was the basis for determining the gain from the sale of property acquired prior to that date.

The principle of the *Ludey decision* is applicable here. The reduction of the cost basis by depreciation sustained prior to March 1, 1913, is necessary to determine the true cost and thus to arrive at the full profit accrued subsequent to March 1, 1913.

There can be no constitutional objection to this theory and it has been adopted consistently in decisions of the Board in rulings of the Internal Revenue Bureau under the Revenue Act of 1921 and previous revenue acts. Congress in enacting Section 202 (b) (1) of the Revenue Act of 1921 without making any specific provision as to depreciation must be presumed to have acquiesced in this practice.

In the Revenue Act of 1924 Congress changed the rule as to depreciation but in the Revenue Act of 1926 it enacted into law the Bureau rule existing prior to the Revenue Act of 1924 and thus impliedly approved the construction given by the Bureau to Section 202 (b) (1) of the Revenue Act of 1921 in requiring adjustments for depreciation prior to March 1, 1913.

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ARGUMENT

I

In determining the gain realized in 1922 on the sale of property acquired prior to March 1, 1913, when the basis is cost, proper adjustment of the cost should be made for depreciation sustained between the date of acquisition and March 1, 1913

At the outset the attention of the court is called to the fact that the record does not adequately disclose the basis of the Board's redetermination of the tax liability as to the method actually used in determining the gain from the sale of the buildings as distinguished from the gain from the sale of the land.

The Board's findings of fact show that the Commissioner originally placed a market value, as distinguished from cost, of $345,463.54 as of March 1, 1913, on both land and buildings and that the petitioners asked for a determination of a fair market value as of March 1, 1913, of $466,132.27. (R. 40.)

The Board in its opinion stated that the land alone had a fair market value of $382,797.80 as of March 1, 1913, and that the taxpayer had failed to sustain the burden of proof as to the fair market value as of that date of the buildings alone. (R. 41.) In the last sentence of its opinion it directed that the gain from the sale of the property should be determined as follows (R. 42):

> The amount of taxable gain resulting from the sale of this property should be recomputed, based upon a value of $382,797.80 for the land plus the depreciated value of the buildings, all as of March 1, 1913.

From the use of the term "the depreciated value of the buildings, all as of March 1, 1913," it is not clear whether the Board directed the Commissioner to determine the March 1, 1913, basis as to the buildings by extrinsic evidence and in lieu of better evidence to determine the March 1, 1913, market value (as distinguished from cost) of the buildings by depreciated cost as of that date, or whether the Board instructed the Commissioner to reject entirely the basis of *market value* and use in lieu thereof the basis of *cost,* measuring the latter by the original cost as reduced by depreciation sustained prior to March 1, 1913.

The orders of redetermination do not disclose how the computation was made, but the statement of the method of determination set forth in the petition for review (R. 51–53) is correct. Under such circumstances there may be a doubt as to whether any question is raised in the record for determination by this court. Both the petitioners and the respondent, however, have proceeded on the theory that while the land was treated on the basis of value, the buildings were treated on the basis of cost, and that the question as to whether on the latter basis cost should be reduced by depreciation is properly here for review.

Section 202 (b) (1) of the Revenue Act of 1921, *supra,* provides that in determining the gain or loss from the sale of property acquired prior to March 1, 1913, the basis for measuring the gain or loss is

the cost or March 1, 1913, value, whichever is greater.

Applying that provision to the instant case the Board of Tax Appeals determined the gain from the sale of the land minus the improvements by using the fair market value as of March 1, 1913, which it found to be $382,797.80, an amount in excess of the original cost, $94,610.64. (R. 39, 40.) In determining the gain from the sale of the improvements, however, it found that the cost of the improvements (instead of the March 1, 1913, value) was the proper basis to be used and in measuring the gain reduced the cost by depreciation sustained prior to March 1, 1913, as well as by depreciation sustained between March 1, 1913, and the date of sale.

The petitioners do not raise any question as to the correctness of the Board's determination other than its reduction of the cost basis by depreciation sustained prior to March 1, 1913.

The petitioners argue that Section 202 (b) (1) of the Revenue Act of 1921 does not specifically provide for an adjustment in the cost basis for depreciation sustained prior to March 1, 1913, and that in requiring such an adjustment the respondent is attempting to read something into Section 202 (b) (1) that is not properly to be drawn from the provisions themselves and is indeed in conflict with them.

The respondent freely admits that none of the Revenue Acts prior to the Revenue Act of 1924 contained any specific provision for reducing either the basis of cost or the basis of the March 1, 1913, value by depreciation sustained or allowed either before or after March 1, 1913. The petitioners, however, have not denied that depreciation sustained subsequent to March 1, 1913, is a proper adjustment and the Supreme Court of the United States in *United States* v. *Ludey,* 274 U. S. 295, in a case arising under the Revenue Act of 1916 held that the requirement in that Act that the March 1, 1913, value of property be used as a basis in determining the gain from the sale should be construed as requiring deductions for both depreciation and depletion. While the *Ludey case* did not involve any question of depreciation and depletion sustained prior to March 1, 1913, it is authority for the principle that the reduction of the cost basis by depreciation may be required without specific provision therefor in the revenue act.

There can be no constitutional objections to the imposition of the tax on so much of the profit from the sale as results from the reduction of the cost basis by depreciation sustained prior to March 1, 1913. Congress may lawfully tax all gains arising from the sale of property in so far as they have accrued subsequent to March 1, 1913. *Merchants' L. & T. Co.* v. *Smietanka,* 255 U. S. 509; *Goodrich* v. *Edwards,* 255 U. S. 527; *Walsh* v. *Brewster,* 255

U. S. 536. It can not be said in this case that the respondent proposes to tax any gain accruing prior to March 1, 1913. On the contrary, under the respondent's theory and practice, the original cost is taken as the starting point and that basis is reduced by the amount of depreciation sustained and increased by the amount of improvements to determine the true cost as of March 1, 1913. The profit taxed is the difference between the true cost on March 1, 1913, and the selling price; that is, the entire profit actually accruing subsequent to March 1, 1913.

From an accounting standpoint there can be no question that in determining the actual gain from the sale of a depreciable asset the amount of the gain is the difference between the depreciated cost and the sale price. The theory of annual allowances for depreciation and of adjustments for depreciation in determining gain from the sale of property is well stated in the *Ludey case,* as follows (pp. 300–301):

> Congress, in providing that the basis for determining gain or loss should be the cost or the 1913 value, *was not attempting to provide an exclusive formula for the computation.* The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. The amount of the

> allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost. *The theory underlying this allowance for depreciation is that by using up the plant, a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold. When the plant is disposed of after years of use, the thing then sold is not the whole thing originally acquired. The amount of the depreciation must be deducted from the original cost of the whole in order to determine the cost of that disposed of in the final sale of properties.* Any other construction would permit a double deduction for the loss of the same capital assets. (Italics supplied.)

Applying the reasoning of the *Ludey case* to the facts in the instant case it is clear that when the petitioners used the buildings here involved during the years prior to March 1, 1913, they were making a gradual sale of the buildings and on March 1, 1913, they did not own and could not sell the whole of the original buildings but they had and could sell only such portion as had not been disposed of through depreciation. Further "sales" of the property through depreciation were made subsequent to March 1, 1913, so that what they actually

sold in 1922 was the original buildings less the depreciation sustained from the date of acquisition in 1907.

Another analogy may be drawn which illustrates our position. If between 1907 and March 1, 1913, a part of one of the buildings had been destroyed by fire and had been compensated for in part by insurance it would scarcely be considered that in determining the gain from the sale no account should be taken of those facts and that the basis should be the original cost without adjustment. Depreciation operates in a similar way. If not regarded as a gradual sale of the property it may be regarded as a gradual physical destruction of the property.

It is our view that in prescribing a basis of "cost" in Section 202 (b) (1) of the Revenue Act of 1921, Congress, to quote the language of the *Ludey decision,* "was not attempting to provide an exclusive formula for the computation" and that to arrive at the true cost of the petitioners' buildings it is necessary to make an adjustment for depreciation sustained prior to March 1, 1913. This view finds support in the earlier decisions of the Board of Tax Appeals in *Appeal of Even Realty Co.,* 1 B. T. A. 355, and *Noaker Ice Cream Co.* v. *Commissioner of Internal Revenue,* 9 B. T. A. 1100. The reasoning on which it is based is well stated in the opinion of the Board in the *Even Realty Company case,* as follows (pp. 358, 364):

We have no hesitation in holding that Congress in using the word *basis* meant nothing but *starting point* or *primary figure* in the computation of gain or loss, and had no intention of restricting that computation to a simple subtraction of the basis from the selling price or vice versa. It expected the computation to include all adjustments necessary to a logical ascertainment of gain or loss. The only reason for using the word at all was to take care of the different situations arising when the property disposed of had been acquired (a) before and (b) on or after March 1, 1913. It fixed the starting point or primary figure of computation in the respective cases, but did not attempt to define every step of the computation under varying circumstances. In some cases, as when a taxpayer buys a security for one price and sells it for another, a simple subtraction is all that is necessary to determine his gain or loss. But, in other cases, either the basis or the sale price must be adjusted before making the subtraction in order to have the difference truly represent the gain or loss. For example: If a taxpayer owned property on March 1, 1913, then worth $10,000, thereafter made permanent improvements thereon at an expense of $5,000, and later sold it for $16,000, it is obvious that the difference between the $10,000 *basis* and the $16,000 sale price is not a proper measure of the gain from the transaction. If one bought land with timber upon it for

$10,000 in 1914, cut down the timber, and later sold the land for $11,000, his gain could not properly be computed without reference to the value realized by him in cutting the timber—and this would be true whether or not he had sold the timber, whether or not he had taken account of it on his books or in his tax returns, and whether or not he had claimed a deduction in his tax returns for depletion.

* * * * *

The same considerations that lead us to the conclusion that adjustment for recoveries of capital by allowance for exhaustion, wear and tear, and obsolescence must be made in computing gain upon the sale of property, compel us to the belief that similar adjustments should be made to cost before comparing it with value on March 1, 1913, for the purpose of deciding which of them should be the basis for that computation. If the taxpayer recovered a part of the cost of his property before March 1, 1913, only the balance of that cost can properly be recoverable thereafter. The Constitution certainly does not entitle a taxpayer to recover any part of his cost more than once, before becoming accountable for taxes upon his gain. If, after proper adjustment for partial recoveries, it appears that the cost exceeds the value at March 1, 1913, that adjusted cost rather than the March 1, 1913, value should be taken as the basis for all subsequent computations; if it be less than the

> March 1, 1913, value the latter is the proper basis. Thus, if a taxpayer in 1903 buys a building with a normal life of 20 years for $10,000, and recovers in rents one-half of that cost by 1913, he is entitled to recover thereafter through deductions or upon the sale of the property either $5,000 or the market value at March 1, 1913, whichever is higher. To allow more would be permitting him a double recovery of part of his capital investment before accounting for profit, and certainly the Constitution does not compel that.

The *Noaker Ice Cream Company case* decided by the Board after the decision of the Supreme Court in the *Ludey case* is an affirmation of the Board's decision in the *Even Realty Company case.*

The petitioners have cited as opposed to the Board's view the case of *Heiner* v. *Tindle,* 276 U. S. 582. That question was, it is true, involved in the record in the *Tindle case,* but it was not raised or considered either in the Supreme Court or the courts below. In these circumstances it can not be said to have been authoritatively decided. As was said in *United States* v. *Mitchell,* 271 U. S. 9, 14:

> It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall,* 266 U. S. 507, 511.

Moreover, the *Tindle case* was remanded to the District Court for the Western District of Pennsylvania for a determination of the loss derived from the sale of the property there involved, and it can not yet be said what computation will be made by the District Court. The cases of *Goodrich* v. *Edwards, supra; Walsh* v. *Brewster, supra; Lucas* v. *Alexander,* 279 U. S. 573; *United States* v. *Flannery,* 268 U. S. 98; and *McCaughn* v. *Ludington,* 268 U. S. 106. involve sales of bonds, stocks, and other property incapable of depreciation and can not be said to have established any rule with respect to adjustments for depreciation.

The only argument presented by the taxpayer that deserves serious consideration is that in the *Ludey case* the Court indicated in its opinion that where the March 1, 1913, value is used as a basis, the subsequent depreciation and depletion adjustments should be measured by the amounts allowable under the appropriate Revenue Acts. The petitioners contend that such a holding is equally applicable to cases where "cost" is the basis, and, if the property is acquired prior to March 1, 1913, there is a period between the time of acquisition and March 1, 1913, in which there were no Revenue Acts in force, and hence no allowable *depreciation.* It is recognized that there is force to this argument and that this precise point presented difficulty to the Board of Tax Appeals in the case of *Noaker*

Ice Cream Company, supra, as is indicated by the dissenting opinion concurred in by seven members of the Board upon which the petitioners rely. The majority opinion, however, sustains the respondent's position and for reasons previously stated it is believed that the Board's prevailing opinion presents the proper solution of the question. In that opinion it was said (p. 1103):

> Obviously, it was unnecessary in that case to consider depreciation or depletion which was sustained on cost prior to March 1, 1913, for the reason that cost was less than the March 1, 1913, value, and, therefore, when we have a selling price which exceeds either the cost or selling price, we need concern ourselves only with the higher of two, which in this case was the March 1, 1913, value. The reason which prompted the court to limit the depreciation and depletion to be deducted to that allowable as a deduction from 1913 to 1917 is not only explainable but is also entirely logical when we consider that the allowable depletion under the Revenue Act of 1913 was not on the basis of depletion sustained, but was limited to a percentage of the output of a mine. In any other manner it is difficult to see the necessity for making a distinction between "sustained" and "allowable" since when applied to depreciation the amount sustained in any one year could hardly be said not to be the reasonable allowance contemplated by the statute (ex-

cept under the 1913 Act applicable to individuals entitled to such a deduction on account of mining property).

It is further urged that it has been the established practice of the Internal Revenue Bureau under the Revenue Act of 1921 and prior Revenue Acts to reduce the cost basis by depreciation sustained prior to March 1, 1913. The petitioners so concede. (Br. p. 20.) While Article 1561 of Regulations 62, *supra,* does not specifically mention depreciation sustained prior to March 1, 1913, there were in effect during the years involved certain Bureau rulings supplemental to the regulations in which it was held that an adjustment for such depreciation should be made in determining the gain or loss from the sale of property. T. D. 3206, C. B. 5, p. 51; I. T. 1494, C. B. I–2, p. 19; A. R. R. 6930, C. B. III–1, p. 45. These rulings, adopted for the guidance of the administrative bureau charged with the enforcement of the act, are entitled to considerable weight. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *National Lead Co.* v. *United States,* 252 U. S. 140. This is the more true since Congress, in enacting the Revenue Act of 1921 without making any express provision for depreciation, must be taken to have legislated with reference to the existing Bureau practice as set forth in T. D. 3206, *supra. National Lead Co.* v. *United States, supra.*

II

The legislative history of the enactment of Section 202 (b) (1) of the Revenue Act of 1921 does not show that in enacting that provision Congress intended that no adjustment for depreciation sustained prior to March 1, 1913, should be made in the cost basis

None of the Revenue Acts prior to the Revenue Act of 1924 contained any specific provision for a reduction of cost or March 1, 1913, value by depreciation whether sustained prior to or subsequent to March 1, 1913, nor was any discussion of the propriety of such deductions included in the House and Senate Reports under the Revenue Acts of 1913, 1916, 1918, or 1921.

The petitioners have referred to the Revenue Act of 1921 as containing changed provisions as to the computation of gain or loss from the sale of property acquired prior to March 1, 1913, and has attempted to draw from such changes an inference as to the intent of Congress relative to adjustments for depreciation.

A comparison of the corresponding provisions of the previous revenue acts with Section 202 (b) of the Revenue Act of 1921 shows conclusively the fallacy of this argument.

Section 2 (c) of the Revenue Act of 1916, c. 463, 39 Stat. 756, provides as follows:

> SEC. 2. (c) For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen

hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived.

The Revenue Act of 1917 made no amendment of this provision.

Section 202 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, provides as follows:

> SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and
>
> (2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

Section 202 (b) of the Revenue Act of 1921, *supra*, provides as follows:

> SEC. 202. (b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but—
>
> (1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall

be the excess of the amount realized therefor over such fair market price or value;

(2) If its fair market price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; and

(3) If the amount realized therefor is more than such basis but not more than its fair market price or value as of March 1, 1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income.

It will be noted that none of these sections contained any provision as to depreciation and that the change in the Revenue Act of 1921 had merely to do with the question of using cost or March 1, 1913, value as a basis. This change as appears clearly from H. R. No. 350, 67th Cong., 1st Session, p. 9 (cited on page 13 of petitioners' brief), and S. R. 275, 67th Cong., 1st Session, p. 10 (cited on page 14 of petitioners' brief) was made because of the decisions of the Supreme Court in the cases of *Merchants' L. & T. Co.* v. *Smietanka,* 255 U. S. 509; *Goodrich* v. *Edwards, supra;* and *Walsh* v. *Brewster, supra,* all of which related to sales of stocks and bonds rather than sales of depreciable property.

The questions involved in those cases had to do with such problems as whether a gain equivalent to the difference between selling price and fair

market value as of March 1, 1913, should be taxed when such value was less than cost. There is consequently nothing in the committee reports under the Revenue Act of 1921 which supports the petitioners' contention that Congress showed an intention to exclude depreciation deductions. On the contrary, as previously pointed out, Congress must be taken to have enacted the provision with notice of the practice of the Internal Revenue Bureau as set forth in T. D. 3206, C. B. 5, p. 51, amending Article 1561 of Regulations 45 as follows:

> ART. 1561. *Basis for determining gain or loss from sale.*—For the purpose of ascertaining the gain or loss from the sale or exchange of property the basis is the cost of such property, or if acquired on or after March 1, 1913, its cost or its approved inventory value. But in the case of property acquired before March 1, 1913, when its fair market value as of that date is in excess of its cost, the gain which is taxable is the excess of the amount realized therefor over such fair market value. Also in the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor. No gain or loss is recognized in the case of property sold or exchanged (a) at more than cost but at less than its fair market value as of March 1, 1913, or (b) at less than cost but at more than its fair market value as of March 1,

> 1913. In any case proper adjustment must be made for any depreciation or depletion sustained. * * *

The Revenue Act of 1924, c. 234, 43 Stat. 253, contains the following provision:

> SEC. 202. (b) In computing the amount of gain or loss under subdivision (a) proper adjustment shall be made for (1) any expenditure properly chargeable to capital account, and (2) any item of loss, exhaustion, wear and tear, obsolescence, amortization, or depletion, previously allowed with respect to such property.

Relative to this provision H. R. 179, 68th Cong., 1st Session, p. 12, shows the following:

> SEC. 202. (2) There is no provision in the existing law which corresponds to subdivision (b), but the rule laid down therein is substantially the same as the construction placed upon the existing law by the Treasury Department. It provides that in computing gain or loss from the sale or other disposition of property the cost or other basis of the property (and in the appropriate case the fair market value as of March 1, 1913) shall be increased by the amount of items properly chargeable to capital account and decreased by the depreciation and similar deductions allowed with respect to the property. Under this provision capital charges, such as improvements, and betterments, and carrying charges, such as taxes on unproductive prop-

> erty, are to be added to the cost of the property in determining the gain or loss from its subsequent sale, and items such as depreciation and obsolescence previously allowed with respect to the property are to be subtracted from the cost of the property in determining the gain or loss from its subsequent sale.

It is conceded that this report indicates that Congress thought it was enacting into law the existing departmental rule as to depreciation. In view of existing rulings which have been cited, however, such as T. D. 3206, I. T. 1494, and A. R. R. 6930, *supra,* which provide for adjustments for depreciation *sustained* prior to and subsequent to March 1, 1913, it is clear that Section 202 (b) of the Revenue Act of 1924, if construed as authorizing depreciation adjustments only to the extent that deductions for depreciation had been allowed in computing net income for previous years, represented a new rule. Obviously, either the Committee was misinformed as to the Departmental rule or in its comment it lost sight of depreciation sustained prior to March 1, 1913, and had in mind only depreciation sustained since that date, which in many cases is that actually charged off by the taxpayer and allowed as deductions. Cf. Article 1561 of Regulations 62, *supra.*

In enacting the Revenue Act of 1926, as is shown in H. R. 1, 69th Cong., 1st Session, pp. 5–6, and in S. R. 52, 69th Cong., 1st Session, pp. 16–16, Congress desired to change the provisions of the existing

law, that is, the Revenue Act of 1924, which authorized an adjustment only as to "depreciation allowed." Accordingly, for the first time the Bureau's rule as to adjustments for depreciation which existed prior to the Revenue Act of 1924 was incorporated in the law for the first time.

Section 202 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, provides:

> SEC. 202. (b) In computing the amount of gain or loss under subdivision (a)—
>
> (1) Proper adjustments shall be made for any expenditure or item of loss properly chargeable to capital account, and
>
> (2) The basis shall be diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion which have since the acquisition of the property been allowable in respect of such property under this Act or prior income tax laws; but in no case shall the amount of the diminution in respect of depletion exceed a depletion deduction computed without reference to discovery value or to paragraph (2) of subdivision (c) of section 204. In addition, if the property was acquired before March 1, 1913, the basis (if other than the fair market value as of March 1, 1913) shall be diminished in the amount of exhaustion, wear and tear, obsolescence, and depletion actually sustained before such date.

It is our view that in incorporating Section 202 (b) in the Revenue Act of 1926 Congress ex-

pressly repudiated the provision of the Revenue Act of 1924 and enacted into law the departmental practice existing before its enactment. That the Treasury Department, prior to the enactment of the Revenue Act of 1924, required an adjustment for depreciation sustained prior to March 1, 1913, identical with that required by Section 202 (b) of the Revenue Act of 1926 is conceded by petitioners. (Br. 10, 20.) In view of these concessions it is difficult to understand how it can be argued that Section 202 (b) of the Revenue Act of 1926 constitutes wholly new legislation.

The proper construction to place upon the enactment of Section 202 (b) of the Revenue Act of 1926 is that Congress clarified the law as it existed in the Revenue Act of 1921 and prior revenue acts and that its intention as to the proper construction of those acts (where depreciation adjustments were not specifically provided for) may be gathered from the language of Section 202 (b) of the Revenue Act of 1926.

As this court said in *United States* v. *Phez Co.* (C. C. A. 9th), 28 F. (2d) 106, at p. 107:

> If it can be gathered, from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, it will amount to a legislative declaration of its meaning and will govern the construction of the first statute.

In the same connection see *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 20–21, where the court said:

> As we have no doubt of the meaning of the prior law, the subsequent legislation can not be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act.

CONCLUSION

In view of the foregoing the decision of the Board of Tax Appeals should be affirmed.

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